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„Peace through International Criminal Law? The International Criminal Court as a Capacity for Peace in the International Relations“

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List of Abbreviations

AIDP	Association Internationale de Droit Pénal
AP	Additional Protocol
Art.	Article
ASPA	American Service-Member's Protection Act
ASP	Assembly of States Parties
AU	African Union
BIA	Bilateral Immunity Agreement
CICC	Coalition for an International Criminal Court
EU	European Union
GC	Geneva Convention
ICC	International Criminal Court
ICJ	International Court of Justice
ICL	International Criminal Law
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILA	International Law Association
ILC	International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
FRY	Federal Republic of Yugoslavia
GA	General Assembly
LDC	Least Developed Country
NGO	Non-Governmental Organization
PrepCom	Preparatory Committee

Res.	Resolution
RUF	Revolutionary United Front, Sierra Leone
SC	Security Council
Statute/Rome Statute	Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 1998
UK	United Kingdom
U.N./UN	United Nations
UNTAET	United Nations Transitional Administration in East Timor
U.S./US/USA	United States
WTO	World Trade Organization

Introduction

International criminal jurisdiction is a scion of hundreds of years of wars and international institutionalization. Drafted to fulfil the purpose of bringing justice, especially to the perpetrators of crimes that are part of a bigger plan or show systematics; hanging the little ones and letting the big ones run shall no longer be the brutal reality in large-scale¹ conflicts. Rather, war is declared on impunity that has been put before justice on any number of occasions in the global history.

Experts on the law of nations seem to doubt the effectiveness of the introduction of criminal law into the international area to the same extent as experts on criminal law question the law of nations as an assertive legal order.² International Criminal Law is instructed in the field of the law of nations and as such is exposed to political strategy and will, and for a large part dependant on these conditions to exist in order to function. Set up with the goal to build, keep or promote peace by neutralizing former offenses, these dependencies construct a very difficult net of politics and law, torn between the goal to achieve peace and justice without trading one for the other.

The strive for peace connects societies all over the world as possibly the only true universal value; numerous international organisations, research institutes, NGOs and individuals make it their daily business. Centuries of war led to the establishment of the national state as the transitional climax of intrastate peace; the same credo is leading the international community in its search for ways to establish global peace. In an increasingly institutionalized world, the United Nations was erected as the most ambitious project dedicated to this purpose.

The upsurge of the human rights in a globalized medial world allowing proceedings to be watched everywhere led to the establishment of the belief that certain values deserve protection. Global courts were erected for that purpose: the protection of humanity.

¹ The ICC's jurisdiction will span over four statutory offenses that will be further described in the following chapters. Large-scale crimes and macro-crimes will be used as shorter expressions when bearing on these crimes.

² Ambos, "Zur Bestrafung Von Verbrechen Im Internationalen, Nicht-Internationalen Und Internen Konflikt," Humanitäres Völkerrecht. Politische, Rechtliche Und Strafgerichtliche Dimensionen, eds. Jana Hasse, Erwin Müller and Patricia Schneider, Demokratie, Sicherheit, Frieden (Baden-Baden: Nomos, 2001). p. 325.

The International Criminal Court is the latest accomplishment and most far-reaching institution among these courts. Its foundation was accompanied by broad global discussions scrutinising its desirability and efficacy and recent developments continue to stir these debates.

The aim of this thesis is to clarify whether, based on the Statute of Rome, an independent, impartial and effectively working criminal court has been established or whether this has been prevented by the political compromises made. What are the reasons for the US refusal to cooperate with the ICC? Further: Through which mechanisms of action can peace be established by means of the tool of international criminal justice? And, above all, *can* peace be established in such a manner?

Research will be conducted based on the following hypotheses:

- In theory, peace can be established through international criminal prosecution.
- De facto, peacekeeping absolutely requires voluntary cooperation.
- The peacekeeping effect is subordinate to certain conditions, according to whether or not these are given, effects are triggered, through the interaction of which peace can be ensured, created or promoted.
- Due to the multitude of complex conditions, the pacifying effect stays below its possible optimum.

International Criminal Courts have been discussed for over fifty years, the groundwork to their foundation goes back double this time. It took several macro-crimes and two World Wars to burn images into the world conscience that provoked reactions. After long years of political zigzag the ICC was founded as what many viewed as the natural consequence of this process.

In many views, an enormous goal is achieved. Over 100 states, among them Western and many powerful nations have agreed to give up on a certain amount of sovereignty in strive for a greater goal. This constitutes a turnaround in international relations, a remarkable step away from Hobbesian thinking and the Westphalian notion of states.

The true challenges, however, lie ahead. In the Statute of Rome, a treaty based on compromise between its states-parties, peppered with controversial issues that guarantee the persistence of political strategy pursued within the framework of the Court.

The asymmetry in the international system has been preserved in the context of the Court, universality turned out to be beyond reach and the West, setting the tone in international relations, faces the problem of having lost its strongest flagship and only superpower midway between the negotiations.

Besides the fact that two world views are clashing and the American politics as single superpower aims at a different method of international conflict solving – there are de facto matters constituting the working basis of the ICC that the US carps at: The role of the Security Council, a vexed issue reflecting the power dynamics of the involved states, as well the possibility of third-party-jurisdiction through the UN and the debate on the status of peacekeeping troops.

The Treaty of Rome was built on consent and strong moral implications that, so the criticism suggests, considerations of de facto implementation strategies and enforcement have fallen prey to. The model of cooperation underlying the ICC is unlikely to suffice at providing effective enforcement. The principle of complementarity, on the basis of which the ICC initiates investigations, gives some indications of where and following which crimes we will witness processes – and where not, even if to do so would be strongly recommendable.

The belief in the peacekeeping virtue of international criminal jurisdiction lays out a set of mechanisms of action that arise from prosecution and lay the groundwork for future peace. By individualizing guilt, the blame is taken off the collective; the basis for future peaceful coexistence is provided for. The amount of guilt that is hereby pressed on the shoulders of individuals in many cases represents a selection of chosen culprits that are sacrificed for the greater good.

The same trail of thought leads the debate on amnesties: applied in order to enable a peaceful transition process, they grant impunity and thus the very same case the ICC and his predecessors proposed to abolish is tolerated.

To create a basis for reconciliation, the closure of the cycle of retaliation is vital: To effectively impose decisions that the litigant camps will respect, the Court's reputation has to be that of an independent, unbiased institution dedicated to justice and fairness. The political implications in the Court's proceedings can thwart this esteem.

As a possibly feasible alternative, truth commissions are contemplated in brief.

The scope of this thesis will thus lie on the endogenous factors within the ICC; the regulations in the Statute with special attention to the implications arising from them. On several occasions conclusions drawn from the work of the ICTY and ICTR will be consulted in order to prognosticate scenarios for the ICC. Of the cases the ICC is currently administering, the indictment of Sudan's president al-Bashir will serve as a paradigm to illustrate the theoretical problems come to life.

Outer factors taken into account are the international community with special attention given to the situation arising through the limited cooperation the USA is granting the ICC. It is intended to depict the main prospective problems and dilemmas that can be expected to occur.

Numerous sources were revised in order to answer the research questions and confirm the hypotheses. A tremendous amount of books and collected editions reflect the scientific attention the topic of international criminal jurisdiction enjoys in manifold branches of sciences. Many of them were written by people very directly involved in either the ICTY, ICTR or the ICC. Some ooze the enthusiasm with which the progress that has been made is regarded, others draw a completely pessimist picture regarding the de facto possibilities international criminal courts possess apart from those existing in name only. UN Documents, Conventions and Agreements were used as well as newspaper articles, since they represent the best source for ongoing procedures and developments around the ICC. Further, reports of former prosecutor Carla del Ponte were very helpful in order to understand the complex ties with governments, state's interests and the limits to justice. The selected literature was chosen with the aim to consult as many different sources as possible so as to be able to reflect a well-documented and objective treatise.

1 Peace in the International Relations

1.1 Theoretical Groundwork

In the question of international justice, much progress has been made over the past fifty years. The establishment of two *ad hoc* tribunals doesn't suffice, of course, in order to claim that macro-crimes have been brought to justice, but their installation still accounts for a symbol that changes have been coming along. However, studying the work of the tribunals and problems they faced, it becomes very obvious that the

states in the international arena are still reluctant to let themselves be bound by international norms. Many approve of international criminal jurisdiction, but are unwilling to grant support beyond what is useful and beneficial for themselves. To stick to rules that apply equally to all states and accept restrictions to sovereignty has raised resistance that continuously undermines the efforts of international criminal justice.

In order to lay out these processes, the main theoretical frameworks that guide states' approach to international criminal jurisdiction will be sketched out on the following pages. The views on international relations can be subdivided into typically characteristic ideals: anarchical and consensual.³ Idealist, realist, institutionalist, and constructivist theories will serve to explain the complex background that the theses are placed in. A pluralist approach is more suited to the complex aspirations posed in international criminal law and for the sake of clarity the theories shall be outlined characteristically.⁴

1.1.1 Idealist Theory

In the early phase of political theory, the idea of establishing and maintaining peace was prevalent. Idealism suggested the protection of peace through the establishment of international organisations and through diplomatic and legal efforts.⁵

Idealist theory regards the events of the latter half of the past century as the origin of a new political culture that bases its values on the prevention of violence and on team play.⁶ Wendt calls this culture 'the Kantian culture.' Security is not deduced from a superior Leviathan, but from confidence in shared common intentions for peace. This kind of pluralistic security community that comes into existence condemns violence as a legitimate form of dispute settlement.⁷ In other words, it

³ Bassiouni, Introduction to International Criminal Law (Ardsley, New York: Transnational Publishers, 2003). p. 33.

⁴ Schneider, Internationale Gerichtsbarkeit Als Instrument Friedlicher Streitbeilegung. Von Einer Empirisch Fundierten Theorie Zu Einem Innovativen Konzept, Demokratie, Sicherheit, Frieden, ed. Dieter S. Lutz, vol. 154 (Hamburg: Nomos, 2002). p. 142-145.

⁵ Lemke, Internationale Beziehungen. Grundkonzepte, Theorien Und Problemfelder (München Wien: Oldenburg Verlag, 2008). p. 14.

⁶ Wendt, Social Theory of International Politics (Cambridge: Cambridge University Press, 1999). p. 297.

⁷ An example for this kind of security community is the USA's relationship to Canada: Even over conflicts that are hard to resolve, applying military force is not an option, although it would be a piece of cake for the US to picket its military supremacy in order to let their interests prevail. A pluralistic

takes the Lockean culture to the next level: Lockean culture interdicts killing each other, Kantian forbids even attacking. To achieve this cooperation in a pluralistic security community, it seems necessary to be confronted with problems that are not solvable on the national level; fear of environmental collapse and the threat resulting from nuclear weapons and similar scenarios are often used to illustrate this. Kantian culture further requires internalization to a certain degree, meaning that following the rules of the entity and sticking to their own agenda are equal. Cooperation, though, still reflects a strategic decision designed to fit their own purposes.

1.1.2 Realist Theory

Realist approach to international relations is very prominent and dominates the conduction and understanding of this sphere. Being the ruling tradition, all other theories are defined by demarcating from it.⁸ Realist theory regards the international relations as a system of anarchy in which every player strives to survive.⁹ In the anarchical view, states coexist in a Hobbesian world: pursuing one's own interests with regard to fitness for purpose.¹⁰ States are the main players on the international level, they act upon rational thought by attempting to achieve the maximum goal attainment with the resources to their disposition.¹¹ Insecurity leads the states to strive for accumulation of power, which constitutes the uttermost goal.¹² Protecting powers or sanctioning ones are missing. "Hostage to an international environment made threatening by the aggressive urges intrinsic to human nature and by the absence of any effective protecting world government, states seek, by maintaining or augmenting their power, to protect their national interest, which means, first and foremost, their independence."¹³

security community is further distinguishable from collective security systems in that the latter is based on mutual security interests within a specified group of allies. For more on this, see Wendt, 1999.

Ibid. p. 300.

⁸ Krell, Weltbilder Und Weltordnung. Einführung in Die Theorie Der Internationalen Beziehungen (Baden-Baden: Nomos, 2000). p. 99, 100.

⁹ Schneider, Internationale Gerichtsbarkeit Als Instrument Friedlicher Streitbeilegung. Von Einer Empirisch Fundierten Theorie Zu Einem Innovativen Konzept. p. 146.

¹⁰ Bassiouni, Introduction to International Criminal Law. p. 33f.

¹¹ Masala, Kenneth N. Waltz. Einführung in Seine Theorie Und Auseinandersetzung Mit Seinen Kritikern (Baden-Baden: Nomos, 2005). p. 73f.

¹² Schneider, Internationale Gerichtsbarkeit Als Instrument Friedlicher Streitbeilegung. Von Einer Empirisch Fundierten Theorie Zu Einem Innovativen Konzept. p. 146.

¹³ Clinton, The Two Faces of National Interest (Baton Rouge and London: Louisiana State University Press, 1994). P. 32.

The minimum goal constitutes securing one's livelihood.¹⁴ Definition of the self is made over power. Every state is a potential enemy, no superior regulatory entity is given. Cooperation between states is an option only so far as it serves the own interests. The same is true for international law.

Security is necessary and achievable through power and the own position in the state hierarchy has to be upheld. The result is a security dilemma: The arms race leads to a vicious cycle of accumulation of power out of a desire for security that again leads to loss of security as a natural consequence, that is not intended, but inevitable. The arms race is rooted in a desire for safety and as such a defensive policy, but leads to a comparable arms race of other realist states. Its original intention is to prevent war, but the strategy to that is by deterrence and military supremacy. This spiral can be continued ad infinitum.¹⁵

Force is the last resort which is anon not regulated by moral considerations, and moreover legal restrictions apply only as far as favoured. This stringently leads to chaos and conflict, assuming there exists no balance of power like it did during the Cold War.¹⁶ International criminal justice is only regarded as an option, as long as it doesn't collide with other interests or, even more so, if it helps to advance these interests. If that is not the case, it is shunt to give way to more important interests.

Critics comment on realist theory by remarking that states' actual possibilities encompass a much broader spectrum than those factored into the realist theory. Clinton annotates that „the multitudinous objectives of states cannot fit the Procrustean bed of a single goal – power – into which this last definition of *national interest* tries to force them; no matter how elegant the theory, a messy world refuses to be bound by it.”¹⁷ Czempiel regards the security dilemma as primary cause for violence, followed by the anarchy in the system of the international relations. Uneven distribution of power leads to the emergence of a hegemonial power that can

¹⁴ Masala, Kenneth N. Waltz. Einführung in Seine Theorie Und Auseinandersetzung Mit Seinen Kritikern. p. 73f.

¹⁵ Schneider, Internationale Gerichtsbarkeit Als Instrument Friedlicher Streitbeilegung. Von Einer Empirisch Fundierten Theorie Zu Einem Innovativen Konzept. p. 145-146.

¹⁶ Bassiouni, Introduction to International Criminal Law. p. 34.

¹⁷ Clinton, The Two Faces of National Interest. P. 33.

guarantee stability for a certain period of time. On the long run, however, the subordinated actors will strive to free themselves from dependence.¹⁸

1.1.3 Institutional Theory

Institutionalists assume the world is regulated. The will and capacity to overcome difficulties in cooperation is given. The social costs of this regulation of the world produces smaller expenses on social costs. Common institutions such as the UN and international law build the common framework. The interdependence among states leads them to strive for an entity to manage global governance. Still, for cooperation to be carried out, enticements are conditional. Individual rationality and collective rationality cannot be equated. Through institutionalized cooperation secure expectations emerge: All states believe that all states will stick to the rules of the collective rationality. Through principles, norms, provisions and processes, regimes institutionalize cooperation among states. This includes the application of law and mechanisms of dispute resolution. Juridification is of high priority. The results achieved by institutionalizing the international level are higher and produce less costs than in an anarchic world.¹⁹ Regulations in the international arena engender lucidity and thus contribute to the reduction of violence.²⁰

Intertwining and interdependence among the actors in this system is intense as several actors are connected through international institutions. Institutionalists believe that cooperation is the better option when pursuing one's own interests. Common global problems affecting all states are addressed and solved in a jointly fashion.²¹ For their perceived neglectance of the impacts of power that is designated to expose naivety, institutionalist assumptions earn criticism from the other schools of thought.²²

¹⁸ Czempel, Kluge Macht - Außenpolitik Für Das 21. Jahrhundert (München: Verlag C.H. Beck, 1999). p. 123-124.

¹⁹ Schneider, Internationale Gerichtsbarkeit Als Instrument Friedlicher Streitbeilegung. Von Einer Empirisch Fundierten Theorie Zu Einem Innovativen Konzept. p. 146.

²⁰ Czempel, Friedensstrategien. Eine Systematische Darstellung Außenpolitischer Theorien Von Macchiavelli Bis Madariaga (Opladen/Wiesbaden: Westdeutscher Verlag GmbH, 1998). p. 101.

²¹ Lemke, Internationale Beziehungen. Grundkonzepte, Theorien Und Problemfelder. p. 21-22.

²² Keohane, After Hegemony. Cooperation and Discord in the World Political Economy (Princeton and Oxford: Princeton University Press, 1984). p. 7.

1.1.4 Constructivist Theory

Constructivist theory regards the system of international relations as a social construction. Deduced from constructivist learning theory, it is often described as not quite a theory, but rather a general research model applicable to the processing of acquired knowledge and its impact.

The constructivist approach claims that society shapes individuals. Taken to the international level, assuming that states are the individuals, every state is largely to itself, choosing the extent of interference with others purely on considerations of materialism, as elaborated above in the international relations theory mainly characterized by realist thought. But there is also a history of constructivist thought on international relations that underwent an upsurge particularly after the end of the Cold War which had left a chasm that prepared the ground for alternative theories. The inability of the realist approach to serve explanations for it suggested that there might be more to international relations than realist theory suggested there was.²³ The idea of social learning playing an important part in the international system was revived. „At home states are bound by a thick structure of rules that holds their power accountable to society. Abroad they are bound by a different set of rules, the logic, as I shall argue, logics, of anarchy.“²⁴ Wendt deduces this from the ‚international institution of sovereignty‘, which, as long as it prevails, will maintain the international system in this state. According to Wendt, „distributions of ideas are social structures.“²⁵ Shared ideas are the part of social structure reputed as culture, that form the structure of a system of anarchy. Institutions exist because actors create them and fill them with norms.²⁶

Constructivist thought challenges mostly the neorealist approach, that has dominated the scene down to the present day. Neorealist thought defines international relations as static, which also affects the role attributed to international institutions that is being isolated by the neorealist understanding of power. Constructivists challenge the assumption of existing universal laws of global politics that are driven by the reality of

²³ Wendt, Social Theory of International Politics. p. 3.

²⁴ Ibid. p. 13.

²⁵ Ibid. p. 309.

²⁶ Lemke, Internationale Beziehungen. Grundkonzepte, Theorien Und Problemfelder. p. 36.

structures and function independently of time and space.²⁷ The security dilemma that is claimed inevitable by neorealists is a variable constituted by politics and is thus reducible in size, if cooperation in the international system replaces anarchy.²⁸

Constructivists believe „in the role of shared ideas as an ideational structure constraining and shaping behaviour.“²⁹ Three elements are constitutive to constructivist thinking: all actors in the international system have a shared understanding for certain ideas and norms that shapes and guides their conduct as a kind of ideational structure that is the driving motive behind the system, as opposed to neorealist thought, where this incentive is delivered by material structure.

This ideational structure constructs the identities and interests of the actors in it; the actors are being socialized through the process of interaction. Interests and identities aren't constant, but rather subject to change due to the ideational structures radiating to them and influencing them in their goals and the definition of their own roles in the international arena.

Ideational structures and actors have a mutually influential relationship: the same way the structure influences the actors, the actors reproduce and alter the structure that only exists because of the actors in the first place. Dysfunctional arrangements can thus be changed in order to prevent the reproduction of conflicts resulting from it.

Reality as such is always constructed, historically and socially, and thus almost random. It constitutes a product of human construction, and as such, it can be changed by the practice of new social processes. This process is very unlikely to happen in a short period of time, but the basic possibility of its happening is what constructivist thought is all about.³⁰ Wendt points out that „the high death rate of the Hobbesian culture creates incentives to create a Lockean culture, and the continuing violence of the latter, particularly as the forces of destruction improve in response to its competitive logic, creates incentives in turn to move to a Kantian culture.“³¹ There is nowhere near enough to a guarantee that this will happen, but it is safe to assume that international relations will at least not develop backwards. History teaches that

²⁷ Copeland, "The Constructivist Challenge to Structural Realism: A Review Essay," Constructivism and International Relations: Alexander Wendt and His Critics, eds. Stefano Guzzini and Anna Leander (Routledge Chapman & Hall, 2006). p. 3-4.

²⁸ Czempel, Kluge Macht - Außenpolitik Für Das 21. Jahrhundert. p. 122.

²⁹ Copeland, "The Constructivist Challenge to Structural Realism: A Review Essay." p. 3.

³⁰ Ibid. p. 3-4.

³¹ Wendt, Social Theory of International Politics. p. 311.

once certain rights are acquired, they are only very reluctantly given up again. This is true for states as well as individuals.³²

The different views on the world are necessary to understand the diverse assumptions about the desirability and standing of international criminal jurisdiction. The limits are dim and therefore hard to set; and more and more the different theories are branching out into more specific ones.³³

1.2 The Ambiguous Concept of Peace

1.2.1 The History of Ideas on Peace

The strive for peace in the international relations is a phenomena that can be traced back throughout thousands of years. Preventing wars through the establishment of legal orders has been on the agenda of humankind since its origins. The failures witnessed throughout all times is obvious through the history of wars. Nevertheless, there has been progress in the idea of peaceful conflict-resolution.³⁴

The pair of opposites of war and peace has been dominating the political life of the past century. In the history of ideas of the modern era, the positions on these antonyms can be broken down into two main counter antitheses: One defines peace as an expression of human will, rationally justified as a political product that requires to be the result of agreement through treaties. Its maintenance has to be safeguarded through the public order. War is thus the consequence of human wrongdoing and as such constitutes normality in intra- and interstate relations.³⁵

In the other concept, peace is conceived as a cosmic principle of arrangement that constitutes a world order that founded its legitimacy in god. After the secularization process reason took the place as imperative and legitimator common to all people.³⁶ This position was taken by Kant. He defined peace as a value constituted by reason

³² In order to back up this assertion, Wendt names the example of voting rights: Once granted, there is nearly no case in which they were gradually taken away again. Ibid. p. 312.

³³ Schneider, Internationale Gerichtsbarkeit Als Instrument Friedlicher Streitbeilegung. Von Einer Empirisch Fundierten Theorie Zu Einem Innovativen Konzept. p. 143-145.

³⁴ Schneider, ""Frieden Durch Recht": Von Der Einhegung Des Krieges Zur Gewaltfreien Konfliktbeilegung," Frieden Durch Recht. Friedenssicherung Durch Internationale Rechtssprechung, eds. Patricia Schneider, Kristina Thony and Erwin Müller, vol. 157, Demokratie, Sicherheit, Frieden (Hamburg: Nomos, 2003). p. 27.

³⁵ Meyers, Begriff Und Probleme Des Friedens (Opladen: Leske + Budrich, 1994). p. 108f.

³⁶ Ibid. p. 108.

which conducts action on the state level as well as the behaviour of the individual. The strive for peace is the topic underlying Kant's entire thinking³⁷ as it constitutes an imperative that is categorically imposed on humankind.³⁸

The imperative for peace is thus a priori: Reason as the highest morally legislative force demands for a state of peace. This in turn calls for the safeguarding of peace through law. Peace and law enter into a relationship in which peace is defined through law. As such, the definition of peace delivered by Kant is clearly distinguishable from older definitions by Augustin, Erasmus, and Pufendorf, who defined it through its content.³⁹

Kant took the thought even further: for a rupture of peace, he demanded retaliation, for he thought that by ignoring the crime, the spectator becomes a perpetrator. Similar reasoning is also found at Hegel, who felt that by neutralizing the crime it will be prevented from attaining validity.⁴⁰

Kant's 'Perpetual Peace' has given impulses to the international peace-discourse that haven't ceased to influence yet. His call for an international law principled by reason as well as his demand for a universal peace order founded to bind inter-state relations and ban military force once and for all can still be heard in scientific discussion over peace issues.⁴¹ This idea of a law of peace among the nations can be seen as the first of its kind and brings in its wake the founding of the United Nations that should be established 150 years after the publishing of Kant's 'Perpetual Peace'.⁴² This kind of international peace law, as proposed by Kant, would require a system of jurisdictional control in order to function as a global safeguard.⁴³ The development of the 20th century as one of growing institutionalization such as

³⁷ Höffe, Gerechtigkeit. Eine Philosophische Einführung (München: C.H.Beck, 2001). p. 96.

³⁸ Meyers, Begriff Und Probleme Des Friedens. p. 22.

³⁹ Steiger, "Frieden Durch Institution. Frieden Und Völkerbund Bei Kant Und Danach," Frieden Durch Recht. Kants Friedensidee Und Das Problem Einer Neuen Weltordnung, eds. Matthias Lutz-Bachmann and James Bohman (Frankfurt am Main: Suhrkamp Verlag, 1996).p. 141f.

⁴⁰ Reese, "Fünf Offene Fragen Zum Internationalen Strafgerichtshof - Und Der Versuch Einer Antwort," Vom Recht Der Macht Zur Macht Des Rechts? Interdisziplinäre Beiträge Zur Zukunft Internationaler Strafgerichte, eds. Frank Neubacher and Anne Klein, Kölner Kriminalwissenschaftliche Schriften (Berlin: Duncker & Humblot, 2006). p. 81.

⁴¹ Lutz-Bachmann, "Kants Friedensidee Und Das Rechtsphilosophische Konzept Einer Weltrepublik," Frieden Durch Recht. Kants Friedensidee Und Das Problem Einer Neuen Weltordnung, eds. Matthias Lutz-Bachmann and James Bohman (Frankfurt am Main: Suhrkamp Verlag, 1996). p. 25. See also: Höffe, Gerechtigkeit. Eine Philosophische Einführung. p. 97.

⁴² Lutz-Bachmann, "Kants Friedensidee Und Das Rechtsphilosophische Konzept Einer Weltrepublik." p. 25f.

⁴³ Blanke, "Der Internationale Strafgerichtshof," Archiv des Völkerrechts 39. Band (2001). p. 142.

through the United Nations and the European Union proves Kant right to a certain extent.

The Kantian concept suggests the rule of law, which, although lacking centralized enforcement mechanisms, at least criminalizes certain behaviour, provided that the states have internalized these limits that are to be observed. Thus, through this internalization, a decentralized authority is created. It doesn't result in anarchy, because anarchy requires the condition of lacking rules, which is not the case. It is also not a state or a state-similar entity, such as the EU. Wendt, the creator of this concept, argues that the idea of centralized power is so predominant in thinking about authority, that this idea of a decentralized authority is only slowly starting to grasp attention.⁴⁴

Waltz treats the international system as one of anarchy due to the lack of hierarchy that within states is sustained through the control of power in the form of government. International hierarchy could thus take the shape of a world government. The idea 'governance without government', developed by Helen Miller, suggests the governance through international institutions.⁴⁵ In general, the Lockean view of the Westphalian state system has steadily kept dominating the past three centuries. Streaks of Hobbesianism have never managed to successfully spread a 'kill or be killed climate' and rule out the 'live and let live system'.⁴⁶

1.2.2 The History of Ideas on Warfare

„When talking about peace, don't remain silent on war.“⁴⁷ For a more thorough perspective on peace, the concept of war cannot be left untouched. How to regulate violence has been one of the most profound questions related to establishing order that consequently affects all areas of life.⁴⁸

Two questions have shaped the history of ideas on warfare: the embodiment of the *ius ad bellum*, the right to warfare, and the *ius in bello*, regulating the permissible behaviour in war. The dual structure is virtually consequential: The foundation of

⁴⁴ Wendt, Social Theory of International Politics. p. 307-308.

⁴⁵ Ibid. p. 307.

⁴⁶ Ibid. p. 297.

⁴⁷ Meyers, Begriff Und Probleme Des Friedens. p. 113. Translated by the author.

⁴⁸ Wendt, Social Theory of International Politics. p. 8.

states in the modern era limited the right to warfare to the sovereign only, thus the limitation of the law in warfare needed to be bodied out.⁴⁹

In the years from 1648 to 1945 inter-state wars dominated the international relations and coined its structure. Attempts to regulate warfare were made during this era by regularizing the legality of starting a war (*iusta causa belli*) as well as controlling warfare as such by standardizing what is allowed during warfare (*ius in bello*). The emergence of law to regularize interstate conflicts took place around the beginning of the nineteenth century: this international humanitarian law – to use the modern term – regulates the conditions under which war is warrantable. It can be described as the attempt to regulate the irregular.⁵⁰ Aiming at damage-containment in the context of a war situation, international humanitarian law is led by the belief that certain behaviour that is not tolerated in peaceful times is standard procedure in war situations. Nevertheless, the range of tolerance is also not unlimited during times of war, concentrating especially on the protection of certain people and objects. The humanization of war roots in the enlightened states of the 18th and 19th century, specifically in the ideas of Henri Dunant. The Swiss philanthrope developed a set of measurements to improve the situation of the wounded and ill which formed the basis of the foundation for national committees of the Red Cross. It was later modified and expanded to cover also the wounded and shipwrecked resulting from maritime warfare.⁵¹ Although it had been agreed upon, no enforcement mechanisms were ever arranged in order to control the abidance of these provisions.⁵² In general, since the establishment of the prohibition of the use of force, this has been severely abridged. Further, the alteration of war threatens to render international humanitarian law obsolete.⁵³

⁴⁹ Meyers, Begriff Und Probleme Des Friedens. p. 103.

⁵⁰ Daase, "Das Humanitäre Völkerrecht Und Der Wandel Des Krieges," Humanitäres Völkerrecht. Politische, Rechtliche Und Strafergerichtliche Dimensionen, eds. Jana Hasse, Erwin Müller and Patricia Schneider, Demokratie, Sicherheit, Frieden (Baden-Baden: Nomos, 2001). p. 133-134, p. 140, p. 157.

⁵¹ Schneider, ""Frieden Durch Recht": Von Der Einhegung Des Krieges Zur Gewaltfreien Konfliktbeilegung." p. 28f.

⁵² Sewall, Kaysen and Scharf, "The United States and the International Criminal Court: An Overview," The United States and the International Criminal Court. National Security and International Law, eds. Sarah B. Sewall and Carl Kaysen (Lanham, Boulder, New York, Oxford: Rowman & Littlefield Publishers, Inc., 2000). p. 5.

⁵³ Daase, "Das Humanitäre Völkerrecht Und Der Wandel Des Krieges." p. 140, p. 157.

1.2.3 Peace and Justice

If international justice is what is strived for by the ICC, it is essential to clarify the meaning of it. Is the idea of bringing justice an illusion of the political sciences?⁵⁴ The belief that prosecution of crimes leads to deterrence and justice and, in the long run, to peace, is the leitmotiv preceding the establishment of the Court. Clearly, to define justice in the legal tradition misses out on the moral dimension. To avoid that, justice has to be more than the compliance of existing laws.⁵⁵

If assumed that justice is not an international category but a national one, a clash of views between different states with different cultures will inevitably occur when justice is pursued in a crime scenario involving more than one culture. Czempiel concludes from this that in an international system, peace cannot be an achievement of justice, because justice is followed by war. So justice and peace stand in a contradictory relation towards each other. Both require the existence of the other in order to subsist. If justice is left aside in order to guarantee an unjust peace, violence persists. On the other hand, if justice is considered, violence will still persist due to the subjectivity of justice. The only possibility to rule out the dilemma is to state that peace must imply the renunciation of violence while pursuing justice.⁵⁶

Peace created in a legal form and the existence of justice are mutually dependant. Also, they create and carry one another into effect. This moots the question as to how the relation between peace and justice can be seen. If justice is placed over peace, that would make the latter its natural product. In this context, war constitutes a recess: bellum ruptura pacis. Peace is thus not-war: pax absentia belli. If peace has to be established through the public order, justice is the legitimating force behind it and thus subordinate to peace. Naturally, without peace justice can't be carried into effect.⁵⁷

⁵⁴ Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden (Augsburg: Nomos Verlag, 2006). p. 49.

⁵⁵ If it weren't, the life imprisonment of Nelson Mandela by an apartheid court would be just. Mafwenga, "The Contribution of the International Criminal Tribunal for Rwanda to Reconciliation in Rwanda," International Crimes, Peace, and Human Rights: The Role of the International Criminal Court, ed. Dinah Shelton (Ardsley, New York: Transnational Publishers, Inc., 2000). p. 13.

⁵⁶ Czempiel, "Der Friede - Sein Begriff, Seine Strategien," Beiträge zur Konfliktforschung 4 (1988). p. 7-8.

⁵⁷ Meyers, Begriff Und Probleme Des Friedens. p. 108.

Adapting the hypothesis laid out by Meyers, the present antinomy can be traced back in the history of ideas. Peace as a condition endowed by agreement versus natural peace as an expression of justice, underlying the notion of reason. In the era of absolutism the construction of the *Anstaltsstaat* (institutional state) received the standing of a union for peace.⁵⁸ The national state is the temporary culmination of the intent to maintain intrastate peace. Within this, the notions of peace are transferred from the inner-state level to the international level. The constitution of states as unions for peace on the inside allows for inter-state relations to come into existence. Suddenly, the superior leviathan exists no more, the states find themselves in an anarchic system that doesn't guarantee peace. The realist strive for power over resources and territory as well as economic superiority demands for peace to be brought about by a contract. The terms peace and peace treaty thus become identical. Meyers describes this as the emergence of a formal peace notion, that was followed by the latter notion of peace in substantive law as a reaction to a definition of peace that was solely defined through the absence of war.⁵⁹

The imperative to justice is universal. So are various kinds of crimes, such as narcotrafficking or human trafficking. Crimes against humanity lead to a collective and global sense of responsibility. The strive for justice that legitimizes the national state thus are the same suggesting the foundation of a world republic.⁶⁰ Wendt names the example of Americans typically identifying with the US, but also Canada and the West and essentially, especially in certain issues that include large crime scenarios, with the entire humankind. Based on this reasoning, the same can be true of states: different issues will be met with different degrees of willingness to engage in sharing. However, when sovereignty is involved, it's safe to presume that the disposition to cooperation is hard to attain.⁶¹

Another view is that of doubt regarding the deterring effect of punishment and the proposition of trading peace for justice in order to end a conflict.⁶² However, justice cannot be entirely ruled out in the process. It might not necessarily be achievable in each and every case through international criminal law, but it still has to be strived for

⁵⁸ Ibid. p. 112.

⁵⁹ Ibid. p. 112. See also: Höffe, *Gerechtigkeit. Eine Philosophische Einführung*. p. 97.

⁶⁰ Höffe, *Gerechtigkeit. Eine Philosophische Einführung*. p. 97, p. 102-103.

⁶¹ Wendt, *Social Theory of International Politics*. p. 306-307.

⁶² Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millenium*. (Ardsley, New York: Transnational Publishers, Inc., 2002). p. 9.

in order to establish peace. If not by retrospectively bringing justice to the victims, 'preventive social justice' can be established. It is the lack of this kind of justice that enables the mobilization of the masses necessary in order to commit large-scale crimes.⁶³ On the other hand, „someone facing prosecution before an *international* Court may perhaps hold the opinion that he has not much to lose, but may gain a lot, perhaps, even avoiding criminal responsibility, when *continuing* a programme of ethnical cleansing.“⁶⁴ And further, „must it be taken for granted, that persons in charge of such power will not put their foot down to stop atrocities, if they are sure that they have to face prosecution and trial immediately after their opponents or the international community gets hold of them?“⁶⁵

1.2.4 Peace through Enforcement of International Criminal Law

The theoretical framework guiding the establishment of the International Criminal Court suggests the promotion of peace through law. Quite frankly, by transforming the national democratic model of law and order onto the international level. Dispeace or lack of peace is often brought about by insecurity. The predictability of behaviour of the other facilitates the relinquishment of violence to protect the self. Making international relations more predictable is one of the core functions of international law. By creating the general framework for the abandonment of violence such as regulations as for the whereabouts of dispute resolution and crisis management, this can be achieved.⁶⁶ Peace as such is the motive and ultimate goal of the legal system, regardless of whether the actual term peace is employed.

Czempiel defines peace as a political and economic process, that promotes the maintenance of the existence of the individual by reducing violent settlement of disputes, and guarantees a continuous unfolding of their existence by securing the

⁶³ Mafwenga, "The Contribution of the International Criminal Tribunal for Rwanda to Reconciliation in Rwanda." p. 16.

⁶⁴ Triffterer, "The Preventive and the Repressive Function of the International Criminal Court," The Rome Statute of the International Criminal Court: A Challenge to Impunity, eds. Mauro Politi and Giuseppe Nesi (Aldershot: Ashgate Publishing Limited, 2001). p. 138.

⁶⁵ Ibid. p. 139.

⁶⁶ Bothe, "Friedensbegriff Im Verfassungs- Und Völkerrecht," Frieden Durch Recht. Kants Friedensidee Und Das Problem Einer Neuen Weltordnung, eds. Matthias Lutz-Bachmann and James Bohman (Frankfurt am Main: Suhrkamp Verlag, 1996). p. 187.

increase of equal opportunities.⁶⁷ The judiciary's main purpose is to indistinctively enforce the rights of people.⁶⁸

Johan Galtung defines harmony as a state absent of direct and structural violence. The concept of peace outlined by him suggests the existence of negative and positive peace. Negative peace defines itself through the absence of substantial violence, positive peace includes also the absence of structural violence.⁶⁹ Peace is thus more than a state absent of war.⁷⁰ Thus, positive peace and injustice cannot exist at the same time.⁷¹

How will international criminal law contribute to the establishment of peace? Penal law is as such orientated towards the past as it penalizes crimes that have happened in the past. By resolving the issue, peace in the future is hoped for. Hence, penal law can only create negative peace by itself. Positive peace will follow after the establishment of a blueprint for lasting peace, a task mainly in the hands of politics.⁷² In order to achieve this, the existence of mutual benefit is irreplaceable. Treaties and conventions constitute attempts to build harmony on normative, remunerative and punitive power. Unequal treaties will freeze hierarchies in the way they are and thus constitute structural violence. An example for such a non peace-building treaty is the Treaty of Versailles.⁷³

The international community thus requires a set of mutually binding normative expectations. Galtung differentiates between dissociative and associative peace systems, the latter being based on cooperation on a social basis and spatially through communication. A dissociative model would suffice for negative peace at most. In the associative state system, treaties, conventions, and organizations are woven in that serve as repositories for normative regulations that all parties stick to and in turn expect to be abided by others.⁷⁴

⁶⁷ Czempel, "Der Friede – sein Begriff, seine Strategien." p. 9-10. Cited in Meyers, Begriff Und Probleme Des Friedens. p. 64.

⁶⁸ Höffe, Gerechtigkeit. Eine Philosophische Einführung. p. 54.

⁶⁹ Galtung, Strukturelle Gewalt. Beiträge zur Friedens- und Konfliktforschung, p. 32. Cited in Meyers, Begriff Und Probleme Des Friedens. p. 64.

⁷⁰ Rittberger, "Ist Frieden möglich?" p. 1139. Cited in Ibid. p. 64.

⁷¹ Mafwenga, "The Contribution of the International Criminal Tribunal for Rwanda to Reconciliation in Rwanda." p. 16.

⁷² Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden. p. 73ff.

⁷³ Galtung, Peace by Peaceful Means. Peace and Conflict, Development and Civilization (Oslo: SAGE Publications, 1996). p. 62.

⁷⁴ Ibid. p. 61–62.

1.2.5 Cultural Relativism vs. Universal Applicability

International Criminal Law asserts the claim to global significance. Thus it is necessary to ascertain the rightfulness of this claim. If its emergence is dependant on cultural values, can we nevertheless assume its international all-embracing validity?⁷⁵ Considering the aspirations of international criminal law to claim universal validity and significance, to affirm that there are cultural differences prevailing in principle would reduce these ambitions to absurdity.⁷⁶ World War II at the latest generated a global awareness for grave breaches of human rights. The degree of this awareness, however, differs among the peoples of the world.⁷⁷ Similarly, the perception of justice is created through consens within a particular culture.⁷⁸ Yet the establishment of world courts suggest that certain dictums enjoy universal validity – that is to say – that independent off ethnic, religious or geographical factors, there is agreement on a number of issues, generally involving the biggest committable atrocities.⁷⁹ Schneider calls the strive for peace a value linking the peoples.⁸⁰

As seen in the recent debate on the charges pressed against the Sudanese president Omar Hassan-al-Bashir, Arab leaders united in defending al-Bashir against what they call ‚Western colonial arrogance’. The Court’s actions, they argue, are designed based on the Western perception of the Arab countries as weak. By pressing forward with an arrest warrant, the Court is interfering with the sovereignty of Sudan, who didn’t sign or ratify the Statute of Rome and is thus not a states-party to the Court. This reproach of the ICC operating in violation of the third-party-principle will be discussed further in Chapter 4.2.1. Another argument held against the rightfulness of al-Bashirs indictment blames the ICC to act based on Western double-standards. While accusing al-Bashir, no criticism has been proclaimed towards

⁷⁵ Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden. p. 37.

⁷⁶ Ibid. p. 37.

⁷⁷ Bassiouni, Introduction to International Criminal Law. p. 25.

⁷⁸ Czempiel, "Der Friede - Sein Begriff, Seine Strategien." p. 8.

⁷⁹ Tilley, "Cultural Relativism," Human Rights Quarterly 22 (2000). p. 545f.

⁸⁰ Schneider, Internationale Gerichtsbarkeit Als Instrument Friedlicher Streitbeilegung. Von Einer Empirisch Fundierten Theorie Zu Einem Innovativen Konzept. p. 37.
For useful discussions, see Tilley, "Cultural Relativism."

Israel's offensive in Gaza and Lebanon. Further, they demanded criminal prosecution of the US war in Iraq.⁸¹

The deep disagreement between the Arab League and the actions taken by the Court is clearly visible. However, the criticism is not directed towards the content of the charges. It is safe to assume that the large-scale atrocities committed in Sudan are not viewed as such by the West only. As clearly pointed out, Israel's actions in Gaza are clearly considered war crimes by the Arab League. Hence, we can assume that there is agreement over these atrocious acts constituting crimes. The indictment of al-Bashir is perceived as unjust, but reasoning is based on interference in internal affairs of Sudan and an allegedly biased view of the atrocities committed there, and not on a general dissent over the fact that human rights are being violated.

1.2.5.1 Western Imperialism?

The ICC was founded through a multinational treaty between a number of states without narrowing the definition of state down to a common denominator. This leads to an essential question: Do all states share combining values such as governance or democracy? Quite frankly, the states-parties to this treaty differ greatly in terms of their internal constitutions.

The dominance of the state as the only legitimate holder of power, a prerequisite in order to be able to implement binding decisions, varies to great extents in many developing countries.⁸² Consequently the next step required by international criminal jurisdiction – the crucial relinquishment of sovereignty – depends on this sovereignty to exist in the first place. The model pursued thus essentially skips a mandatory stage of development, if the western democratic model of statehood is what international criminal law is based on.

On a theoretical basis, the definition of statehood necessary in order to be able to comply with the ICC's requirements can be broken down to an effective authority of

⁸¹ Slackman and Worth, "Often Split, Arab Leaders Unite for Sudan's Chief," Herald Tribune March 31, 2009, <http://www.heraldtribune.com/article/20090331/ZNYT03/903313003>

At the beginning of April, the UN sent a commission of experts to Gaza in order to investigate the accusation of war crimes committed by Israel. The commission is lead by Richard Goldstone, former chef prosecutor for the ICTY and ICTR. Böhm, "Auch Staatschefs Müssen Strafe Fürchten," Die Zeit Online April 9, 2009

⁸² Wimmer, Die Modernisierung Politischer Systeme. Staat - Parteien - Öffentlichkeit (Wien, Köln, Weimar: Böhlau Verlag, 2000). p. 149-150.

the state in order to be able to seize and search and perform arrests, and a juridical arm that needs to be, not necessary fully, but basically functioning. The fact that the treaty exercises binding force on the population further requires an effective authority of the state in order to legitimately sign it as their representative. However, a functioning democracy is not anywhere near a prerequisite. But from a functional point of view, considering that the ICC is an institution that relies to a great deal on its member-states for execution of its decisions, it is only to be expected how certain states will assert their authority on their national territory.

Nevertheless, the question of cultural imperialism touches on one of the core issues in international institutions and moreover in international criminal tribunals: Are the methods of conflict solving thereby aspired globally applicable? Is international criminal law enforceable in states where national power is not enforceable? And further, is the ICC emblematically an embodiment exporting democracy?

A thorough discussion of this issue would not only go beyond the scope of this thesis, but will inevitably require time for the institution to be confronted with these scenarios. It can still be ascertained that a clear dichotomy exists in the considerations concerning the ICC's features: the institution aspires moral strength and therefore doesn't exclude anyone who will be willing to cooperate. The practical weakness that results from and grows proportionally to this moral strength is problematic, but essentially it is this moral strength that the court strives for that enables rejecting the accusation of western imperialism. The possibility of abuse of the ICC through western imperialist nations, however, is not out of the question, as will be laid out in chapter 4. Through international criminal law a medium of norms is created that can be legitimately enforced, even or especially in the case of an inner-state collapse. The question as to whether international criminal law can be enforced when the national state is powerless can be affirmed: Where the hands of the international community were legally tied before, a loophole has been formed to act on legitimate legal ground.

Since the Court intervenes in the most serious violations of human rights around the globe, the reproach of exporting democracy might seem valid at first. However, as a juridical institution dedicated to justice after grave breaches, the Court by definition acts in retrospect. As such, it clears up past offenses without conducting future scenarios. The ICC engages in the penal prosecution of criminals as an outsider. The

establishment of democratic institutions constitutes a possible consequence to the ICC's interference, but is not in the hands of the Court. The Court steps in as a defender of human rights where the national state fails to do so. Hence, the labeling of its endeavours as exports of democracy sustain to the extent that by applying the rule of law, an attribute of a constitutional state is being imposed on a semi-universal level. A normative guidance as to in which direction less developed countries should aim their progress is given through international justice.

1.2.5.2 Neopatrimonialism

The theories that have been applied in Chapter 2.1. represent the biggest theories of international relations. Since a failure of these can be detected especially in the context of explaining developing countries, it seems necessary to address this problem. Due to the distinct forms in which development has taken place in different areas of the world, inevitably a number of distinct models of states exist. On many, the concept of statehood has rather been imposed than developed by itself and subsequently malfunctioned. Neopatrimonialist states are not failed states, because this would require that they have been states that subsequently failed. The status of statehood has, however, never been accomplished. 'Spheres of limited statehood' are attributed as particularly jeopardized in erupting into violent war: of the 200 wars waged since 1945, 90 per cent occurred in transforming or developing countries (as of 2008).⁸³

Neopatrimonialism merges traditional and modern elements and constitutes a period of transition. Wimmer focuses on countries south of the Sahara, which is precisely where the four conflicts the ICC is currently administering are located. Neopatrimonialism is indicated through personal rule, clientelistic politics and endemic corruption. A neopatrimonialistic regime, or rather, a neopatrimonialistic system, can be defined as one that is prevented from developing towards modern statehood through blockades that are mostly produced by the system itself. According to Wimmer, one of the indicators of a neopatrimonial system is the strikingly low level of institutionalization of law, a fact that is yet aggravated by the structures of its political system which stands contrary to development of certainty of

⁸³ Lemke, Internationale Beziehungen. Grundkonzepte, Theorien Und Problemfelder. p. 80.

law.⁸⁴ „The perverseness of state power from a guarantor of law and order to an entity threatening the integrity of people has its roots in this and became the rule rather than the exception in sub-saharan Africa.“⁸⁵ This is a problem for the acknowledgement of the legitimacy a tool such as the ICC requires to enjoy among the affected people. The association with western ideas of governance could tip the scale in both ways for the ICC: it could be perceived by the population as a white knight strong enough and able to interfere with national state malfunctions, or it could be equated with other forms of not self-chosen power imposed on them and yet worse, even by a foreign power.

1.3 Peace as a Normative Objective in the United Nations

The establishment of peace defined the utter objective of the League of Nations. The UN took over that same objective of the League of Nations and ranks peace within its top priorities,⁸⁶ if not its single and only reason for existence. „The United Nations was created primarily ,to save succeeding generations from the scourge of war‘.⁸⁷ In terms of regularization of the international sphere the foundation of the United Nations constitutes a step ahead away from the state of nature between states.⁸⁸ Highlighting the need „to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security“ the UN’s charter „affirms faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.“⁸⁹ Through ongoing communication through an international institution, wars that aim at the abolition of the other’s existence are reduced in likeliness. The ,absoluteness of war’ is no longer given. Rather, through the existence

⁸⁴ Wimmer, Die Modernisierung Politischer Systeme. Staat - Parteien - Öffentlichkeit. p. p. 111-150, 159.

⁸⁵ Ibid. p. 151.

⁸⁶ Bothe, "Friedensbegriff Im Verfassungs- Und Völkerrecht." p. 194.

⁸⁷ Ferencz, "The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century," Humanitäres Völkerrecht. Politische, Rechtliche Und Strafergerichtliche Dimensionen, eds. Jana Hasse, Erwin Müller and Patricia Schneider (Baden-Baden: Nomos, 2001). p. 363.

⁸⁸ Brunkhorst, "Paradigmenwechsel Im Völkerrecht? Lehren Aus Bosnien," Frieden Durch Recht. Kants Friedensidee Und Das Problem Einer Neuen Weltordnung, eds. Matthias Lutz-Bachmann and James Bohman (Frankfurt am Main: Suhrkamp, 1996). p. 252.

⁸⁹ UN, "Charter of the United Nations," (San Francisco: <http://www.un.org/en/documents/charter/>, June 26, 1945), vol. Preamble.

of the UN and the membership in it, the necessity of cooperation and communication is acknowledged.⁹⁰

The use of violence is ranked as the ultimate device for peacekeeping. A more profound emphasis on peaceful and therefore violence-free methods of peacekeeping emerged during the times of the Cold War. This resulted out of the dilemma of not being capable to make decisions that would have required military force. With the end of that blockade, the relevance of peacekeeping by using military force grew along with the (re-)obtained competence of decision-making in the Security Council.⁹¹ The restraint of intervention and the use of force that builds one of the core principles and purposes of the UN aims at a centralization of the power to exert violence and promotes the perception of peace as the ultimate goal in international relations. The concept of the 'responsibility to protect' has engaged the UN in a debate on the necessity to intervene in cases of state failure in enacting good governance.⁹² The grey area between illegitimate interference and the imperative to assist another country's population is becoming smaller and clearer. Along with the upsurge of the human rights movement, this has led to a challenge of the notion of 'sovereignty at all costs.'

Punishment was replaced by the establishment of peace as the foremost output of criminal prosecution in the course of the 20th century. Before that, it was left unnoticed or even considered unsolicited and counterproductive as a means to promote peace: Especially after World War I the apprehension that the process of coming to terms with the past would produce more hatred was very common.⁹³ The Resolution that established the ICTY, itself the first modern-day tribunal, lists the belief that this tribunal „would contribute to the restoration and maintenance of peace.“⁹⁴ Above all through the anticipated effect of deterrence a promotion of peace was envisaged.⁹⁵ Nitsche refers to this process as 'a refinement of the instruments of

⁹⁰ Czempel, Friedensstrategien. Eine Systematische Darstellung Außenpolitischer Theorien Von Macchiavelli Bis Madariaga. p. 110.

⁹¹ Bothe, "Friedensbegriff Im Verfassungs- Und Völkerrecht." p. 194.

⁹² For useful discussion, see: Sovereignty, "The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty," (Ottawa, Canada: International Development Research Centre, 2001), vol.

⁹³ Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden. p. 165.

⁹⁴ UN, "Resolution 827," (http://www.un.org/icty/legaldoc-e/basic/statut/S-RES-827_93.htm, May 25, 1993), vol.

⁹⁵ Rodman, "Darfur and the Limits of Legal Deterrence," Human Rights Quarterly 30.3 (2008). p. 533.

international politics'.⁹⁶ This was additionally intensified through the gradual strengthening of the UN's primary juridical tool, the ICJ, and in further consequence the establishment of the ICC.

2 International Criminal Law

2.1 International Criminal Law – An Introduction

While jurisprudence invokes the issue of peace and will refer to it in order to justify decisions and legislation, it mostly avoids to go into depth on the notion of peace. Political science anon evades the legal sphere. The grey area between the two disciplines is where definitions of obligations, rights, and hierarchy become very vague.

Criminal law is considered necessary for a peaceful nation. Thus, criminal provisions in international law cannot be out of place when pursuing peace in the international relations.⁹⁷ Two aspects, international peace and security and the collective conscience of humankind form the principal arguments for the introduction of international criminal law into the highly valuable sphere of criminal right.⁹⁸ The necessity to equally protect human rights in order to claim their universal validity is reflected in the development of international jurisdiction.⁹⁹ It reflects the view of crimes against humanity and genocide being crimes that the entire international community is victimized by.¹⁰⁰ The most symbolic event constituted the trials in Jerusalem against Adolf Eichmann, where Israel pressed charges for committing crimes against the Jewish people before a Court that had not even existed yet at the time when these crimes had been committed. In short, the Eichmann trials lacked each of the components that are usually imperative in order to rightfully claim jurisdiction over a criminal case. They were based on the idea, that „certain crimes

⁹⁶ Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden, p. 165.

⁹⁷ Triffterer, "Preliminary Remarks: The Permanent International Criminal Court - Ideal and Reality," Commentary on the Rome Statute of the International Criminal Court, ed. Otto Triffterer, Second Edition ed. (München: C.H. Beck Hart Nomos, 2008). p. 22., at. 15.

⁹⁸ Kirsch, "Introduction," Reflections on the International Criminal Court. Essays in Honour of Adriaan Bos, eds. Herman A.M. von Hebel, Johan G. Lammers and Jolien Schukking (The Hague: T.M.C. Asser Press, 1999). p. 10.

⁹⁹ Blanke, "Der Internationale Strafgerichtshof." p. 142f.

¹⁰⁰ Mafwenga, "The Contribution of the International Criminal Tribunal for Rwanda to Reconciliation in Rwanda." p. 14.

are so universally agreed to be heinous, so potentially disruptive of international peace, and so difficult for any one state to adequately prosecute, that all states have the right to try anyone accused of them."¹⁰¹

International criminal law combines the spheres of traditional penal law and international law in a conflictive manner. Penal Law is as such nation-based and implies the sovereignty of the state like any other branch of law. International Law is a young and less developed field¹⁰², characterized by the classic aspect that combines international activity in unison: it lacks absolute and distinctive enforcement. International criminal law takes from both these branches of law to form a distinctive third one: It demands sovereignty to puny, therefore requires for the national state to give up on punitive sovereignty – an aspect making filing for the court a long and complicated endeavour.

While international law binds only the states as the contracting parties, in international criminal law citizens of the contractual partners become liable for breaches of international law. This recognition of individual criminal responsibility directly under international law is the greatest achievement of international criminal law and as such the element designed to bring about the biggest changes.¹⁰³

Triffterer points out that this is especially significant in order „to protect in a subsidiary way legal values which primarily and originally belong to the national legal order in situations in which State organs or Government officials commit or participate at least tacitly in the commission of the crime and the relevant national judicial systems, therefore, may not be willing or in the position to properly prosecute such behaviour.“¹⁰⁴ The intention is to put an end to impunity, which describes the lack of imposing criminal sanctions against breaches of human rights,¹⁰⁵ especially against

¹⁰¹ Roht-Arriaza, The Pinochet Effect. Transnational Justice in the Age of Human Rights (Philadelphia: University of Pennsylvania Press, 2005). p. 7.

¹⁰² Ferencz, "The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century." p. 354.

¹⁰³ Triffterer, "Preliminary Remarks: The Permanent International Criminal Court - Ideal and Reality." p. 25., at. 25.

¹⁰⁴ Ibid. p. 24., at. 23.

¹⁰⁵ Reese, "Fünf Offene Fragen Zum Internationalen Strafgerichtshof - Und Der Versuch Einer Antwort." p. 80. See also Bruer-Schäfer, Der Internationale Strafgerichtshof. Die Internationale Strafgerichtsbarkeit Im Spannungsfeld Von Recht Und Politik., Schriften Zum Staats- Und Völkerrecht, ed. Prof. Dr. Dieter Blumenwitz, vol. 90 (Würzburg: Europäischer Verlag der Wissenschaften, 2001). p. 126.

the masterplanning minds behind macro-crimes. The irrelevance of official capacity of the indicted is clearly mentioned in the Statute of the ICC.¹⁰⁶

The term international criminal law covers a broad range of provisions and is constantly growing as the amount of international rules accounting for crimes under international law is rising. ICL is derived from international law, national criminal law, comparative criminal law and procedures as well as international and regional human rights law. Its penal aspects are deduced from conventions, customs and general principles of law.¹⁰⁷ Article 38 of the Statute of the ICJ sets out that international criminal law can inherently be created by all sources of the law of nations. This is deduced from the concept that legal systems develop their own norms and standards. The law of nations thus does the same and independently creates its own norms.¹⁰⁸ To accommodate these different branches and areas isn't easy; the result is a very heterogenous conglomerate.¹⁰⁹ Basically, this set of laws is applied by international courts as well as national courts and internationalized courts.¹¹⁰ International law can be conceived as a conglomerate of processes of conflict resolution in the international community. As such, it has to serve as a basis for international criminal proceedings, as it did in the case of the ICTY and the ICTR.¹¹¹

The codification of human rights in international law is mostly an achievement of the UN.¹¹² The overall most important stations ICL has passed were the GC, the Genocide Convention and the Universal Declaration of Human Rights.¹¹³ „Every

¹⁰⁶ "Rome Statute of the International Criminal Court," A/CONF.183/9 of 17 July 1998 (Italy: 1998), vol., 128 vols. Art. 27, p. 18; Preamble.

¹⁰⁷ Bassiouni, Introduction to International Criminal Law. p. 1-2.

¹⁰⁸ Triffterer, "Preliminary Remarks: The Permanent International Criminal Court - Ideal and Reality." p. 22., at. 17.

¹⁰⁹ Bassiouni, Introduction to International Criminal Law. p. 1.

¹¹⁰ Triffterer, "Preliminary Remarks: The Permanent International Criminal Court - Ideal and Reality." p. 22., at. 16.

Triffterer further: Internationalized Courts can apply international criminal law if the law of nations is part of the respective national legal order, and if the Statute of the specific Court doesn't narrow the applicable law to provisions passed for it by a legitimate legislative force, such as the affected State or the body creating the Statute.

¹¹¹ Bohlander, "Völkerrecht Als Grundlage Internationaler Strafverfahren?," Humanitäres Völkerrecht, eds. Jana Hasse, Erwin Müller and Patricia Schneider, Demokratie, Sicherheit, Frieden (Baden-Baden: Nomos, 2001). p. 393-395.

¹¹² Shestack, "The Philosophic Foundations of Human Rights," Human Rights Quarterly 20 (1998). p. 201.

¹¹³ Sewall, Kaysen and Scharf, "The United States and the International Criminal Court: An Overview." p. 1. See also: Farer, "Restraining the Barbarians: Can International Criminal Law Help?," Human Rights Quarterly 22 (2000). p. 108.

custom has its origin in a single act¹¹⁴ – this is believed to be the Nuremberg trials for International Criminal Jurisdiction.¹¹⁵ The main functions of International Criminal Law are to prevent and suppress international criminality, enhance accountability, reduce impunity and establish international criminal justice.¹¹⁶

The set of rules and regulations is essentially complete. Solving conflicts by brutally repressing has become illegal.¹¹⁷ The bigger problem the international community is facing now is the problem of effective enforcement and the challenge of „narrow(ing) the gap between norms and behavior.“¹¹⁸

2.2 Evolution of International Criminal Law

The development of international criminal law has not occurred in a linear manner. The reason for its partly fallow, partly overturning evolution can be explained by the fact that progression of international criminal law has always ensued after grave historical crimes, and only then.¹¹⁹ The first proposal to a universal court was made as early as 1870/71: the impressions of the Prussian-French War prompted the Swiss Gustave Moynier to press ahead with this proposition. Too early in a period of time, where the thought of one sovereign imposing jurisdictional control upon another sovereign was unbearable.¹²⁰

The following outline of the Court's evolution will be subdivided into five different stages throughout the twentieth century. The goal is to depict the gradual development of the idea of international criminal justice that led to the ICC as its transitory terminal station. A concept from Sadat shall be adopted for this thesis, beginning with the two Conferences of the Hague and the First World War, the tribunals of Nuremberg and Tokyo, the post-war and Cold War period, the foundation

¹¹⁴ Quote of the French philosopher Blaise Pascal, quoted in Bassiouni, Introduction to International Criminal Law, p. 24.

¹¹⁵ Ibid. p. 24. See also: Sadat, "The Evolution of the ICC: From the Hague to Rome and Back Again," The United States and the International Criminal Court. National Security and International Law, eds. Sarah B. Sewall and Carl Kaysen (Lanham, Boulder, New York, Oxford: Rowman & Littlefield Publishers Inc., 2000). p. 35.

¹¹⁶ Bassiouni, Introduction to International Criminal Law, p. 1.

¹¹⁷ Farer, "Restraining the Barbarians: Can International Criminal Law Help?," p. 90.

¹¹⁸ Ibid. p. 90.

¹¹⁹ Reese, "Fünf Offene Fragen Zum Internationalen Strafgerichtshof - Und Der Versuch Einer Antwort," p. 71.

¹²⁰ Blanke, "Der Internationale Strafgerichtshof," p. 143.

of the two *ad hoc* tribunals, and ultimately the ICC.¹²¹ The ICTY and the ICTR can be considered as direct predecessors of the ICC, which were preceded by the IMT and the IMTFE. The establishment of the ICC is even seen as the natural consequence of the foundation of the UN and the Universal Declaration of Human Rights by some.¹²² The attempts before the *ad hoc* tribunals cannot be put in a direct linear conjunction with them, given that they were based on entirely different premises, but rather as the seeds of the general idea.¹²³ In conclusion, the establishment of the ICC represents a logical culmination of a development that spans over the past fifty or even hundred years in an attempt to enforce at least partly-universal justice.¹²⁴

2.2.1 The Conferences of The Hague and World War I

The 'First International Peace Conference' was held in The Hague, though the term used to describe it is deceiving. The reason for the call-up was an arms race that the Tsar of Russia could no longer afford and therefore wished to end by inducing a disarmament process. Declarations and Conventions were set up, spiked with numerous clauses regulating exceptions.¹²⁵ „Signatories agreed to ‚use their best efforts (...) as far as possible‘ and to disregard the rules if national honor or ‚essential interests‘ might be endangered“, making it „more a wishlist than a binding accord.“¹²⁶

In 1907 a second conference was held in The Hague and accomplished approximately the same results as the first. The conferences of the Hague are characterized by the standards of a Hobbesian order of states-politics, above all by the tenet that states are only subject to their own law, unless they consent to law legislated by a different origin. Time wasn't ready for the major changes that a turn in

¹²¹ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium, p. 21.

¹²² Bindman, "Washington and the International Court: Illegal U.S. Campaign against International Justice," Herald Tribune July 16, 2003, http://www.iht.com/articles/2003/07/16/edbindman_ed3_.php

¹²³ Bassiouni, Introduction to International Criminal Law, p. 23f.

¹²⁴ Sewall, Kaysen and Scharf, "The United States and the International Criminal Court: An Overview." p. 5. See also: Sadat, "The Evolution of the ICC: From the Hague to Rome and Back Again." p. 31.

¹²⁵ Ferencz, "The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century." p. 355. See also: Sadat, "The Evolution of the ICC: From the Hague to Rome and Back Again." p. 31.

¹²⁶ Ferencz, "The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century." p. 355.

the view towards the notion of statehood would have brought along.¹²⁷ It wasn't until the atrocities committed during World War I, that the thought of prosecution of war crimes was seriously considered and proposed from all over.¹²⁸ Triffterer names the Balkan wars in 1912-1913 as the trigger for serious reflections on a permanent international criminal court.¹²⁹ Essentially the League of Nations commenced the attempt to erect a permanent court and was followed in this endeavour by the UN.¹³⁰ Accountability was first introduced into a field hitherto untouched by it, including that of state officials reputedly liable for international crimes. Indeed, the close-minded, hobbesian view of the state-of-the-art nation was challenged: the foundation of the International Labour Organization to protect the interests of workers, a range of treaties on minorities to protect their status and the attempt to regulate warfare with regard to restricting its methods were heralding the fact that state-sovereignty could be altered.¹³¹

Following World War One, the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties that had been founded at the Preliminary Peace Conference in 1919, suggested the establishment of an international high tribunal to prosecute those accused of crimes against humanity and violation of the laws of war. The target was former German Emperor William II; the trial, however, was never realized.¹³² Nevertheless, the seed was planted. The Advisory Committee of Jurists of the League of Nations advanced a Resolution to establish a High Court of International Justice, the ILA suggested the formation of an international court in 1926 followed by the AIDP in 1928. Both of these proposals

¹²⁷ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium. p. 23. See also: Ferencz, "The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century." p. 355. See also: Sadat, "The Evolution of the Icc: From the Hague to Rome and Back Again." p. 33.

¹²⁸ Ferencz, "The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century." p. 355. See also: Triffterer, "Preliminary Remarks: The Permanent International Criminal Court - Ideal and Reality." p. 16. See also: Sadat, "The Evolution of the Icc: From the Hague to Rome and Back Again." p. 33.

¹²⁹ Triffterer, "Preliminary Remarks: The Permanent International Criminal Court - Ideal and Reality." p. 16.

¹³⁰ Bassiouni, Introduction to International Criminal Law. p. 434.

¹³¹ Cassese, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court," The Rome Statute of the International Criminal Court: A Commentary. Volume I, eds. Antonio Cassese, Paola Gaeta and John R.W.D Jones, vol. I (New York, Oxford: Oxford University Press, 2002). p. 4-5, p.17.

¹³² Murphy, "International Crimes," The United Nations and International Law, ed. Christopher C. Joyner (Cambridge: Cambridge University Press, 1997). p. 378. See also: Ferencz, "The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century." p. 355f. See also: Sadat, "The Evolution of the Icc: From the Hague to Rome and Back Again." p. 33-34.

included the suggestion to try both states and individuals, but upon neither was bestowed consideration.¹³³ As pointed out by Cassese, „ (...) these initiatives could not bear fruit in a period which placed an exceptionally high premium upon considerations of national sovereignty.“¹³⁴ The debate entered into a crunch mode at this point, marking the fact that discussion had entered into the critical phase where certain long-established notions of the state, its rights and obligations, were challenged. Essentially, World War I shows how far states will go jeopardizing international justice for political purposes.¹³⁵ Furthermore, the absence of an international sovereign power disturbed the vision of positive international law. In addition to that, no consensus could be found on whether such a court would even be helpful in the mission to help prevent war. Rather it was feared that the threat of prosecution after a long and painful war would mean the killing stroke for any attempts to establish peace.¹³⁶

2.2.2 The Nuremberg and Tokyo Trials

Efforts to create an International Criminal Court were taken up again after the atrocities of World War II. The US proved to be the biggest advocate of a trial rather than an execution of the Nazi leaders.¹³⁷ In the aftermath of the Second World War, the International Commission for Penal Reconstruction and Development and the United Nations War Crimes Commission drafted suggestions and proposals concerning the establishment of a court to try war criminals. The proposition most alike to today's court was that of the London International Assembly from the year 1941, made under the guardianship of the League of Nations. It proposed the prosecution of cases that would fail to belong in the jurisdiction of any state; the cases being reduced to a small and mostly undefined range of war crimes. It even proposed to install an international police force responsible for executing the orders

¹³³ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium. p. 24-25.

See also: Triffterer, "Preliminary Remarks: The Permanent International Criminal Court - Ideal and Reality." p. 16.

¹³⁴ Cassese, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court." p. 5.

¹³⁵ Ibid., p. 21. p. 8.

¹³⁶ Sadat, "The Evolution of the Icc: From the Hague to Rome and Back Again." p. 34.

¹³⁷ Ibid. p. 34.

of the Court.¹³⁸ What followed were the Nuremberg and Tokyo tribunals, both wielded as the poorest examples of international criminal jurisdiction in the scientific literature on the topic. With the Nuremberg trials receiving much more attention for the sake of the bad aftertaste the Tokyo Trials left, both lacked credibility. The agreement, commonly known as the London Accord, summarized in thirty articles the procedural conditions and the range of its jurisdiction. The crimes charged are the same as those of the contemporary ICC: Crimes against peace, war crimes, and crimes against humanity, lacking the controversial crime of aggression. The objection of the accused Germans concerning state sovereignty were rejected by the tribunal¹³⁹, thus the concept of crimes being *under* international criminal law was manifested.¹⁴⁰ This aspect bears the criticism of impinging on the *nullum crimen sine proevia lege* principle, however, it marked the beginning of the process in the course of which these offenses were subjected to international customary law. The Nuremberg Trials adopted the thought, that since murder and other serious offenses were considered delinquencies in every constitutional legal order, it could be argued that they constitute a kind of universal jurisdiction.¹⁴¹ The Charter held the defendants accountable regardless of their position and standing within the state, as well as disallowing them to plead pursuant of their vocation.¹⁴² The tribunal sought to justify the controversial jurisdiction by coining the phrase: „Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.“¹⁴³

The accusation of the Nuremberg trials to be the tribunal of the victors are not, however, without cause. The political and psychological aftermath of the war was undoubtedly crucial for the outcome of the process, prohibiting a fair and just trial.¹⁴⁴

¹³⁸ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium. p. 26, 27.

¹³⁹ Sadat, "The Evolution of the Icc: From the Hague to Rome and Back Again." p. 35.

¹⁴⁰ Triffterer, "Preliminary Remarks: The Permanent International Criminal Court - Ideal and Reality." p. 16f.

¹⁴¹ Blanke, "Der Internationale Strafgerichtshof." p. 143.

¹⁴² Sadat, "The Evolution of the Icc: From the Hague to Rome and Back Again." p. 35.

¹⁴³ Quoted from „Nürnberger Tribunalschriften“ in: Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium.p. 29.

¹⁴⁴ Ibid. p. 29. See also: Mafwenga, "The Contribution of the International Criminal Tribunal for Rwanda to Reconciliation in Rwanda." p. 15.

The fact that the victors of the war executed the post-war justice makes it impossible to speak of a court that meets constitutional standards.¹⁴⁵

While the supremacy of international law over national law was stressed and the objection concerning the relinquishing of sovereignty of the states was overcome, all of this was only accomplished due to the uneven balance between the allies and Germany. Still, by cherishing the idea of individual accountability of war crimes, be it to initiate it or for the means of how it was carried out, the International Military Tribunal „established the wrongfulness of aggression.“¹⁴⁶ Thus, it criminalized the *ius in bello* as well as the *ius ad bellum*. The reproach of applying law that wasn't positive and had never been applied before turns out to be the most interesting, considering how true this is. However, through the creation of a legal precedent, as occurred, the positive law had been produced as well. Considering especially that the sentence of the IMT is technically not legally binding, the moral signal it emits carries significantly more weight.¹⁴⁷ The tribunals greatest achievement remains that of signaling the moral and political as well as ethical and legal wrongfulness of war as a means of solving conflict between states. Concerning international justice, the post-World War II scenario showed how potent the concept can be provided there is the political will backing it up.¹⁴⁸

2.2.3 The Post-War & Cold-War Period

The idea of an international criminal court was pursued both on the scientific and the political level after the Nuremberg and Tokyo Trials.¹⁴⁹ In 1944, Kelsen wrote that „consequently, the next step on which our efforts must be concentrated is to bring about an international treaty concluded by as many states as possible, victors as well as vanquished, establishing an international criminal court endowed with compulsory jurisdiction.“¹⁵⁰ The UN commissioned committees to reach the codification of the

¹⁴⁵ Fairness and justice would have required the criminal investigation of the atomic bombs dropped on Hiroshima and Nagasaki.

¹⁴⁶ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium.p. 30. See also: Sadat, "The Evolution of the lcc: From the Hague to Rome and Back Again." p. 35.

¹⁴⁷ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium.p. 30.

¹⁴⁸ Cassese, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court." p. 8.

¹⁴⁹ Blanke, "Der Internationale Strafgerichtshof." p. 143.

¹⁵⁰ Kelsen, Peace through Law (Chapel Hill: The University of North Carolina Press, 1944). p. 14.

Nuremberg principles¹⁵¹ and pooled its efforts for the same goal as had the League of Nations: an international criminal jurisdiction for such crimes,¹⁵² The only difference being that the League had aspired a court that worked on the grounds of the 1937 Terrorism Convention. The goal of the United Nations is traceable based on the codification of international crimes and the elaboration of a draft statute for a court.¹⁵³ At the same time, the Genocide Convention was developed and adopted, which also pondered the establishment of an international criminal court.¹⁵⁴

In 1948 the United Nations raised the question of an international criminal court installed on a permanent basis. The reference to this court made in article VI of the Genocide Convention had been removed for the time of substantial objection to such a court and put back into place later.¹⁵⁵ The manufacturing of a draft statute for a permanent court and the codification process of crimes under international law were ineptly two separate processes. This too is explicable with the missing political will to make the project determined and focused on its realistic completion.¹⁵⁶ The International Law Commission, established in 1948, was handed over the task of evaluating the possible establishment of an international court and to further discuss its desirability.¹⁵⁷ It could not be agreed upon whether such a universal court was even desirable, given the fact that the major powers would not consent to it: „the Soviet Union believed its sovereignty would be affected by the establishment of such a tribunal; the United States was not prepared to accept the establishment of such a court at the height of the ‚Cold War;’ France expressed support for the establishment of a permanent international criminal court, but did not throw its weight to further the process; and the UK regarded the idea as politically premature.“¹⁵⁸

¹⁵¹ Ferencz, "The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century." p. 358.

¹⁵² Ibid. p. 358. See also: Cassese, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court." p. 9.

¹⁵³ Cassese, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court." p. 9.

¹⁵⁴ Sadat, "The Evolution of the Icc: From the Hague to Rome and Back Again." p. 36. See also: Roht-Arriaza, The Pinochet Effect. Transnational Justice in the Age of Human Rights. p. 199.

¹⁵⁵ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium. p. 32.

¹⁵⁶ Bassiouni, Introduction to International Criminal Law. p. 434-435f.

¹⁵⁷ Sadat, "The Evolution of the Icc: From the Hague to Rome and Back Again." p. 36.

¹⁵⁸ Bassiouni, Introduction to International Criminal Law. p. 440.

The draft code remained on the agenda of the United Nations even during the Cold War but the atmosphere in international relations during this period had completely frozen every means of international communication and development.¹⁵⁹ Attempting to press ahead with an international criminal court was inconceivable at times when the idea of military and political decisions being avenged by an international institution and its exploitation for political purposes were feared.¹⁶⁰ As a direct consequence of this the Security Council, unable to find some common ground on which to base, stood and watched tremendous breaches of human rights.¹⁶¹ Bassiouni trenchantly calls the period from 1955-1992 'the years of silence'.¹⁶² This period even more so than others was characterized by an almost infinite amount of conflicts that weren't followed by international criminal prosecution. 'Justice was the Cold Wars casualty'.¹⁶³ For instance, international criminal prosecution of Apartheid was planned, but never realized. In 1979, the *ad hoc* Committee for South Africa enquired for a draft statute for such an institution, but nothing was reached.¹⁶⁴ This culture is best described as sovereignty at all costs, even that of humaneness.¹⁶⁵

The GA established a Special Committee consisting of representatives from 17 different states in 1950 to elaborate the drafting of a convention for the erection of a permanent court.¹⁶⁶ In a new draft, called the Geneva Draft, issued by the committee in 1951, the aspect of desirability was left aside to discuss how such a court could function. The outcoming proposal included many of the aspects that were later also part of the ILC draft statute in 1994 and ultimately of the Rome Statute: the recommended erection via multilateral convention to primarily avoid making the court an organ of the UN and having to amend the charta and secondly circumvent the erection via assembly resolution for cause of legal difficulties. It also proposed to extend its jurisdiction over natural persons only, as well as solely on the basis of conventions or agreements and that again only if the affected state transfers authority to the court. Jurisdiction should further have been subject to prior approval

¹⁵⁹ Kirsch, "Introduction." p. 10.

¹⁶⁰ Triffterer, "Preliminary Remarks: The Permanent International Criminal Court - Ideal and Reality." p. 41.

¹⁶¹ Kirsch, "Introduction." p. 10.

¹⁶² Bassiouni, Introduction to International Criminal Law. p. 422. Translated by the author.

¹⁶³ Ibid. p. 422. Translated by the author.

¹⁶⁴ Ibid. p. 444.

¹⁶⁵ Kirsch, "Introduction." p. 10.

¹⁶⁶ Bassiouni, Introduction to International Criminal Law. p. 440.

by the general assembly. The biggest difference that this proposal of a generally weak court comprises compared to the current ICC is that it suggested a semi-permanent court only. The international response to this proposition made it clear that no support, specifically none of the major players, could be expected.¹⁶⁷

The General Assembly further requested a similar committee to manufacture a new report that took after its predecessor by and large in 1953. This new draft had been produced knowing of how the odds were for obtaining acceptance for such a court: The outcome proved to be more realistic, including a significant weakening of the courts power.¹⁶⁸ The political will to consent was lacking in both cases; neither of the two was ever implemented. Furthermore, the UN settled on a definition of aggression in 1974 which made it clear that it would be the task of the SC to define whether or not aggression was on hand.¹⁶⁹

2.2.4 The *ad hoc* Tribunals

After the loosening of the two blocks of the Cold War, work on the court was taken up with a new ray of hope. The dissolution of the former predominant policemen-system left fragmentation and turmoil in the international system. Uprising of nationalism and fundamentalism were the cause of a great number of mostly internal wars.¹⁷⁰ The great majority of wars that have been fought since 1945 were staged in third-world countries, the end of the Cold War changed little about this fact.¹⁷¹ By its end, more wars broke out in the least and less developed countries than ever before. Since the end of the Second World War, an approximated 170 million people have died in the course of over 250 wars and conflicts, a testimony to the necessity of efficient peace-enforcing measurements.¹⁷² Multiethnic states imploded, causing grave breaches of human rights. Particularly the former Eastern block burst with national and ethnic

¹⁶⁷ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium. p. 34-36.

¹⁶⁸ Bassiouni, Introduction to International Criminal Law. p. 441.

¹⁶⁹ Ferencz, "The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century." p. 359.

¹⁷⁰ Cassese, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court." p. 11.

¹⁷¹ Daase, "Das Humanitäre Völkerrecht Und Der Wandel Des Krieges." p. 134.

¹⁷² Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium. p. 4f.

conflicts, producing an unimagineable amount of atrocities.¹⁷³ The war in Former Yugoslavia broke out with uncontrollable aggression, ethnic as well as religious and political war was waged.¹⁷⁴ Simultaneously, the Human Rights Movement and the pressure on the dignity of man were undergoing an upsurge. The situation was similar to the climate after World War II: Fury over such egregious direness was immense and incited work on a permanent court at last.¹⁷⁵ In addition to that, the vast number of wars provoked the political and scientific discourse on the role of international institutions in the future prevention and intervention in wars.¹⁷⁶

Both the ICTY as well as the ICTR were produced by a resolution, not by a multilateral treaty.¹⁷⁷ In 1992, Res. 780 determined a commission of experts to evaluate whether the GC or other international humanitarian laws had been violated in Former Yugoslavia. This was affirmed, and subsequently the ICTY was established.¹⁷⁸ This was essentially the first time a tribunal decided over the outcome of a conflict that was not erected by the winning party.¹⁷⁹ When the war in Rwanda broke out in 1994, the unwillingness of the international community to interfere led to the death of an estimated half a million Rwandans. Given the fact that the tribunal hence erected was the second tribunal in a relatively short time, the political persuasion process consumed less time than for the first tribunal.¹⁸⁰ The court for Rwanda is considered to reflect the endeavour to erect a tribunal outside the west and thus prevent the impression of double-standards in the international criminal law. Furthermore, the Rwandan Government itself asked for such a court.¹⁸¹ The tribunal

¹⁷³ Daase, "Das Humanitäre Völkerrecht Und Der Wandel Des Krieges." p. 134f.

¹⁷⁴ Ferencz, "The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century." p. 359.

¹⁷⁵ Cassese, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court." p. 11.

¹⁷⁶ Lemke, Internationale Beziehungen. Grundkonzepte, Theorien Und Problemfelder. p. 80.

¹⁷⁷ The ICTY was erected through Res. 827 (1993). See UN-Dok. S/RES/827 (1993) of May 25th 1993.

¹⁷⁸ Cassese, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court." p. 13.

¹⁷⁹ Goldstone and Bass, "Lessons from the International Criminal Tribunals," The United States and the International Criminal Court. National Security and International Law, eds. Sarah B. Sewall and Carl Kaysen (Lanham, Boulder, New York, Oxford: Rowman & Littlefield Publishers Inc., 2000). p. 51.

¹⁸⁰ Ferencz, "The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century." p. 359-360.

¹⁸¹ Cassese, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court." p. 14.

was created by Resolution 955 on November 8, 1994, declaring the situation in Rwanda a threat to international peace and security.¹⁸²

While the ICTY was established while fighting was still going on and with the intention to deter future criminal action, the ICTRs foundation followed the war in Rwanda. Its aim was to contribute to the peace and reconciliation process.¹⁸³ While the ICTY was likewise set up with the goal to fuel the restoration of peace, reconciliation was not explicitly mentioned, but still considered a goal implicit to the general purpose of the tribunal.¹⁸⁴

The ICTY and the ICTR do not share the same statutes, but did share a common prosecutor and a common appellate chamber until 2003, when they were administratively separated. Cassese takes this as a sign for international criminal prosecution to be enclosed and administered in one permanent entity.¹⁸⁵ The logistic expenditure induced by the tribunals has been enormous and the Security Council was fully occupied with administering them. *Ad hoc* tribunals require their new installment and have to act within narrow bounds concerning *rationae tempore* and *materiae*.¹⁸⁶ The ICTs literally started from scratch¹⁸⁷ and the difficulties experienced „demonstrate the fundamental inability of the SC to micro-manage action-oriented bodies that require constant attention to details.“¹⁸⁸ This accounts as another argument for a permanent court: the selective erection of *ad hoc* tribunals that face a lot more administrative difficulties due to the fact that they don't possess their own financial resources and personnel will not be sufficient to cover the demand for international criminal jurisdiction.¹⁸⁹

¹⁸² Mafwenga, "The Contribution of the International Criminal Tribunal for Rwanda to Reconciliation in Rwanda." p. 11.

¹⁸³ Ibid. p. 11.

¹⁸⁴ Coliver, "The Contribution of the International Criminal Tribunal for the Former Yugoslavia to Reconciliation in Bosnia and Herzegovina," International Crimes, Peace, and Human Rights: The Role of the International Criminal Court, ed. Dinah Shelton (Ardsley, New York: Transnational Publishers, Inc., 2000). p. 19.

¹⁸⁵ Cassese, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court." p. 14.

¹⁸⁶ Wedgwood, "The International Criminal Court: An American View," European Journal of International Law 10 (1999). p. 94.

¹⁸⁷ Sewall, Kaysen and Scharf, "The United States and the International Criminal Court: An Overview." p. 6.

¹⁸⁸ Bassiouni, Introduction to International Criminal Law. p. 434.

¹⁸⁹ Ferencz, "The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century." p. 360.

Towards the UN, the reproach of exercising malfeasance by erecting the tribunals was uttered. Others rate the establishment of the *ad hoc* tribunals - viewing it as a peacekeeping measure - as innovative.¹⁹⁰ On the part of diplomats it was feared that the tribunals would hamper the already difficult situation in the field and interfere with ongoing efforts to end the violence.¹⁹¹ Further, the reproach of partiality against the Serbs was made in the wake of the ICTY.¹⁹² The fact that its establishment can be attributed to the Security Council, the reproach of executing victor's justice doesn't sustain. This, however, doesn't change the fact that there is a democratic deficit to be spotted in the foundation of the tribunals: The ICTY was not proceeded by a constructive dialogue with the involved states concerning their submission of sovereignty. The vote as to whether or not a tribunal should be erected was made a decision of the Security Council as opposed to an election in a 'one country – one vote' fashion.¹⁹³ Despotism and selectivity in terms of the whereabouts of *ad hoc* tribunals were the main reproaches addressed in the matter of establishing non-permanent international criminal courts. It has been considered unwise by the UN to establish special courts in certain regions of the world and not consider the impression of exercising selective justice that is thereby made. Both tribunals voice the selective approach wielded by the Security Council. Tribunals for Sierra Leone, Cambodia and East Timor had also been in debate. Sierra Leone had already had a draft for a tribunal in 2000, the situation in Cambodia and East Timor was similar: the UNTAET in East Timor installed committees that exercised exclusive jurisdiction over serious criminal offenses, including also crimes against humanity and genocide. Little attention was paid to these tribunals in the relevant literature. Further, it has frequently been laid to the ICTY's charge that its jurisdiction functions as a figleaf placed in front of the most appalling crimes ever committed to divert from malfunctioning diplomacies and policies of the United Nations and the great powers.¹⁹⁴

¹⁹⁰ Condorelli and Villalpando, "Relationship of the Court with the United Nations," The Rome Statute of the International Criminal Court: A Commentary, eds. Antonio Cassese, Paola Gaeta and John R.W.D. Jones, vol. I (Oxford: University Press, 2002). p. 219.

¹⁹¹ Rodman, "Darfur and the Limits of Legal Deterrence." p. 534.

¹⁹² Cassese, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court." p. 13f.

¹⁹³ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium. p. 31f.

¹⁹⁴ Cassese, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court." p. 13f.

Considering the civil society, acceptance of the tribunals was widespread. They enjoyed recognition, attribution of fairness and credibility; international criminal jurisdiction has been endorsed in the world public opinion and by many governments. There is now more consensus in the international community over a permanent solution without the difficulties arising from the *ad hoc* tribunals.¹⁹⁵ The manner in which they had been erected was rejected, but their basic outline basically agreed with.¹⁹⁶ In the long run however, *ad hoc* tribunals will not be able to serve the purpose of consistent and just penalization due to their being subject to political contemplation.¹⁹⁷ Their ill successes make the establishment of a permanent institution even more imperative.¹⁹⁸

The actions taken by the SC, when it initiated investigations for the first time since World War II, got the development of the ICC underway unlike anything else in the past.¹⁹⁹ Hereunto Triffterer: „It was understood that the situation, shaped also by growing recognition and acceptance of the jurisprudence of the ICTY and the ICTR, had never been and probably would not be as favourable again for a long time.“²⁰⁰

2.2.5 The International Criminal Court

As a sign for the overcoming of the difficulties that had hindered international cooperation during the Cold War, after its peaceful settlement the UN renewed the assignment to the ILC to inspect the erection of an international criminal court.²⁰¹ The process foregoing the UN World Conference on Human Rights in Vienna in 1993 was spiked with calls for an international criminal court.²⁰²

¹⁹⁵ Ibid.p. 16.

¹⁹⁶ Triffterer, "Preliminary Remarks: The Permanent International Criminal Court - Ideal and Reality." p. 43.

¹⁹⁷ Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden. p. 131.

¹⁹⁸ Bassiouni, Introduction to International Criminal Law. p. 434.

¹⁹⁹ Ibid. p. 448f.

²⁰⁰ Triffterer, "Preliminary Remarks: The Permanent International Criminal Court - Ideal and Reality." p. 36.

²⁰¹ Blanke, "Der Internationale Strafgerichtshof." p. 143.

²⁰² Dias, "Toward International Human Rights Crimes: An Asian Perspective on Human Rights and International Criminal Law," International Crimes, Peace, and Human Rights: The Role of the International Criminal Court, ed. Dinah Shelton (Ardsley, New York: Transnational Publishers, Inc., 2000). p. 35.

The idea of a permanent court was taken up in 1989 on behalf of a search for conflict resolution on the drug trafficking problem.²⁰³ The idea of a court to prosecute this particular crime was raised – and the task handed down to the ILC. At the same time a draft statute for a permanent international criminal court designed to prosecute all international crimes was created by an NGO committee.²⁰⁴ In 1990 this text was given to the Eighth United Nations Congress on Crime Prevention and the Treatment of Offenders, which thus led to the continuation of the establishment process. This then set off the development of several more draft statutes that in the end lead up to the adoption of the Rome Statute. The ILC drafted a statute in 1992, revised it again in 1993 and 1994. The latter was foremost designed to meet political requests of the major powers and thus abandoned its former inherent idealism in favor of more realistic turns. An *ad hoc* committee was appointed to debate the draft.²⁰⁵ The GA then unbuckled the Draft Code of 1991 from the 1994 Draft Statute for an International Criminal Court. It later brought the Preparatory Committee on the Establishment of an International Criminal Court into being in 1996, based on a report delivered by the *Ad hoc* Committee. Based on the ILC's draft, the PrepCom began to alter it. Their final report was resubmitted to the GA with the request to give the PrepCom permission to negotiate in order to produce an even more reinforced text until 1998. The proposal was granted, and the PrepCom took up its work. In 1997, the GA summoned the Rome Conference for June 1998 to finalize the establishment of the court.²⁰⁶ A draft code of crimes that, being a trade-off between outright objectors and firm advocates, lacked the support of many countries was provisionally adopted in 1991 by the ILC.²⁰⁷

As a number of controversial issues were left unanswered for the sheer impossibility of solving them within the PrepCom, debating them was moved to the Conference of Rome itself.²⁰⁸ A diplomatic conference of plenipotentiaries was held to agree on a

²⁰³ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium. p. 37. See also: Bassiouni, Introduction to International Criminal Law. p. 445.

²⁰⁴ Bassiouni, Introduction to International Criminal Law. p. 445. The draft followed the one meant for Apartheid in 1981. Bassiouni, Introduction to International Criminal Law. p. 445.

²⁰⁵ Bassiouni, Introduction to International Criminal Law. p. 446-447.. See also: Kirsch, "Introduction." p. 1.

²⁰⁶ Bassiouni, Introduction to International Criminal Law. p. 446-448.

²⁰⁷ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium. p. 38-39.

²⁰⁸ Kirsch, "Introduction." p. 1.

Statute.²⁰⁹ The treaty of Rome was finally negotiated in the period of June 15 until July 17 in 1998 by representatives of 160 countries. An alliance of in the end altogether 800 NGOs that merged into the Coalition for an International Criminal Court (CICC) and allied with the like-minded states had a crucial influence on the positive outcome of the founding process.²¹⁰ The group of like-minded states involved around 60 states including, among others, the UK.²¹¹ At the end of five weeks of negotiations, the Statute was accepted in a vote of 120 to 7, with an abstention from voting of 21 countries.²¹² Hence, the ICC was supported by almost two thirds of the UN member states.²¹³ Among others, China, Israel, India, Russia and the United States didn't agree to the Statute.²¹⁴ Art.8(2b)viii regulates the proclamation of „the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory“²¹⁵ as a war crime. Wedgwood marks this as a crucial reason for the USA and Israel, in particular, not to sign the treaty.²¹⁶ Less powerful states have reacted with disappointment ranging to intolerance to the withdrawal of big players. The capability of the ICC to carry its purpose into effect is uncertain, given the unequal treatment resulting from this pull-out.²¹⁷

In June 2000, the Preparation Committee laid out a consensus agreement regulating the rules of procedure and evidence and the elements of crimes that need to be

²⁰⁹ Condorelli and Villalpando, "Relationship of the Court with the United Nations." p. 221. See also: Kirsch, "Introduction." p. 2.

²¹⁰ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium. p. 42, 5-7. See also: Kirsch, "Introduction." p. 3.

²¹¹ Zwanenburg, "The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?," European Journal of International Law 10 (1999). p. 125f. See also: Kirsch, "Introduction." p. 3.

²¹² Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium. p. 4. See also: Kirsch, "Introduction." p. 4. See also: Mayerfeld, "Who Shall Be Judge? The United States, the International Criminal Court, and the Global Enforcement of Human Rights," Human Rights Quarterly 25 (2003). p. 95. See also: Sadat, "The Evolution of the lcc: From the Hague to Rome and Back Again." p. 31.

²¹³ Blanke, "Der Internationale Strafgerichtshof." p. 147.

²¹⁴ Ferencz, "The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century." p. 361.

²¹⁵ "Rome Statute of the International Criminal Court," vol. p. 6.

²¹⁶ Wedgwood, "The International Criminal Court: An American View." p. 99.

²¹⁷ Reese, "Fünf Offene Fragen Zum Internationalen Strafgerichtshof - Und Der Versuch Einer Antwort." p. 85.

proved before conviction.²¹⁸ The Court's Statutes entered into force on 1 July, 2002, after 60 states had ratified it.²¹⁹ This was surprisingly early, as its becoming operative was decided and pronounced to be dependant on the pace of the contracts' ratification in the signatory states.²²⁰

It cannot be emphasized enough how the climate of willingness to compromise among the participating state-officials influenced the positive outcome of the conference: Knowing that refusal to cooperate by a small group of states would paralyze the efforts for a court and stall any further progress on it, delaying the issue to an unknown time in the future when the terms for its foundation had never before been so favourable.²²¹ In the period from 1994 to 1997, many governments altered their attitude towards the idea of a court: Between 1982 and 1992 such a change in climate had been unthinkable.²²²

Obviously, to understand the ICC's development requires knowing the long history of the idea of this institution. Specifically when it comes to its peace-keeping intention, a historical outline elaborates the distinctive features that distinguish it from its predecessors. International Criminal Law has undergone a gradual development from an instrument of victor's justice through to a medium for peace-keeping.²²³ „The Statute crystallizes the whole body of law that has gradually emerged over the past fifty years in the international community in this particular problematic area.“²²⁴ The coming into force of the ICC represents an institutionalization of international humanitarian law, as well as an approaching universalization of it. Through that, it can act as a symbol of justice. Whether it can live up to the expectations of being an

²¹⁸ Ferencz, "The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century." p. 361.

²¹⁹ Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law. (New York: Oxford University Press, 2003). p. 1. See also: Kirsch, "Introduction." p. 7. See also: "Rome Statute of the International Criminal Court," vol. Art. 126(1), p. 81.

To be precise, the Statute entered into force at the beginning of the month after the 60th day after the 60th state had ratified it. The ratifying countries are mostly European and South American. Australia, New Zealand, Canada and various African countries as well as some Asian countries signed and ratified the Statute. CICC, Signatories to the Rome Statute (Alphabetical) (www.iccnw.org).

²²⁰ Mayerfeld, "Who Shall Be Judge? The United States, the International Criminal Court, and the Global Enforcement of Human Rights." p. 94.

²²¹ Triffterer, "Preliminary Remarks: The Permanent International Criminal Court - Ideal and Reality." p. 42.

²²² Bassiouni, Introduction to International Criminal Law. p. 448.

²²³ Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden. p. 77.

²²⁴ Cassese, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court." p. 3.

effective bearer of justice will depend on the political will.²²⁵ Negotiating the Court was rough and took a tremendous amount of time, compared to other conventions and agreements that attained semi-international acceptance much quicker. This explains also why the establishment of a permanent international criminal court has taken fifty years longer than the ratification of the Convention on Human Rights and the Genocide Convention.²²⁶

3 The International Criminal Court

The ICC will be resident in The Hague. Administratively it is composed of the presidium, the office of the chancellery, the prosecuting body and three departments: the Pre-Trial Division, the Trial Division and the Appeals Division. The divisions are each divided into chambers consisting of three judges. Four judges and the President are appendant to the Appeals Division. The Chamber of the Prosecutor, led by the Prosecutor, is independent from the Court.²²⁷ However, the prosecutor has to get permission for initiating an investigation from a board of judges. This was installed to reduce the impact the prosecutor's role can have, or in other words, to „check against any overly aggressive tendencies.“²²⁸ A total of 18 judges will be employed at the Court, with a tenure of office of nine years and no possibility of re-election. The ASP functions as a controlling organ for the Court and it will meet once a year. The financing of the Court will be undertaken by the member states and the UN. It can also receive additional voluntary payments by international organisations or other sources.²²⁹

The Statute consists of 128 Articles and a preamble and regulates the crimes, the jurisdiction, the structure of the court, the penal procedure, and the cooperation with the states party to the treaty. *Ratione personae* (Art. 12) allots for automatic jurisdiction in cases where either the state of the alleged perpetrator or the state on whose territory the crime has been committed are parties to the treaty. *Ratione materiae* (Art. 5) regulates the crimes, involving genocide, crimes against humanity,

²²⁵ Ibid.p. 18.

²²⁶ Lee, "Creating an International Criminal Court - of Procedures and Compromises," Reflections on the International Criminal Court. Essays in Honour of Adriaan Bos, eds. Herman A.M. von Hebel, Johan G. Lammers and Jolien Schukking (The Hague T.M.C. Asser Press, 1999). p. 141.

²²⁷ Blanke, "Der Internationale Strafgerichtshof." p. 150.

²²⁸ Roht-Arriaza, The Pinochet Effect. Transnational Justice in the Age of Human Rights. p. 200.

²²⁹ Blanke, "Der Internationale Strafgerichtshof." p. 150.

war crimes and the crime of aggression, subdivided into almost 70 elements of an offense.²³⁰ No consensus could be reached on the definition of the crime of aggression, which is why the Court won't be able to exercise its jurisdiction over it.²³¹ Only crimes that have been committed after the entry into force of the Statute will fall under its jurisdiction according to the principle *nullum crimen, nulla poena sine lege*.²³² To comply with the legal requirements, grave breaches have to meet three requirements: „The conflict has to be armed, it has to be of international nature, and the act has to be addressed at protected persons or objects“.²³³ Crimes committed in internal armed conflicts will, as was established under debate, also fall under the definition of war crimes. This marks a hallmark, since internal armed conflicts make up the majority of conflicts in the world today.²³⁴ This was subject to heated debates in Rome, since the acknowledgement of the idea of crimes affecting only the internal business of a state was only reluctantly accepted.²³⁵ One particular renewal in the Rome Statute is the inclusion of crimes that can be considered as part of a plan or a political strategy, as well as in case of massive perpetration.²³⁶ However, Art. 124 regulates that for a period of seven years, states-parties can refuse to accept the

²³⁰ Ibid. p. 148-151f.

The definition of the crime of genocide is based on the text of the Genocide Convention, that of crimes against humanity bases on the Nuremberg definition of it. It was also under discussion whether to include crimes of terrorism and narcotics crimes. Nanda, "The Establishment of a Permanent International Criminal Court: Challenges Ahead," Human Rights Quarterly 20 (1998). p. 417-419.

²³¹ Kirsch, "Introduction." p. 4.

²³² Blanke, "Der Internationale Strafgerichtshof." p. 152. See also: Kirsch, "Introduction." p. 6.

However, the ICC is free to decide in cases where a crime has begun before the entry into force of the Statute, but continues in its effects until after its becoming effective. This is not explicitly mentioned in the Statute; it will be up to the Court to evaluate whether it has jurisdiction over such a case, which is especially important in crimes involving the disappearance of people and their later reappearance.

Gallón, "The International Criminal Court and the Challenge of Deterrence," International Crimes, Peace, and Human Rights: The Role of the International Criminal Court, ed. Dinah Shelton (Ardsley, New York: Transnational Publishers, Inc, 2000). p. 101.

²³³ Ambos, "Zur Bestrafung Von Verbrechen Im Internationalen, Nicht-Internationalen Und Internen Konflikt." p. 330.

²³⁴ Kirsch, "Introduction." p. 4. See also: Zahnd, "How the International Criminal Court Should Help Implement International Humanitarian Law," International Crimes, Peace, and Human Rights: The Role of the International Criminal Court, ed. Dinah Shelton (Ardsley, New York: Transnational Publishers, Inc., 2000). p. 45.

²³⁵ Zahnd, "How the International Criminal Court Should Help Implement International Humanitarian Law." p. 45; Nanda, "The Establishment of a Permanent International Criminal Court: Challenges Ahead." p. 420.

²³⁶ Systematic rape falls within the definition of a war crime, the resulting pregnancies were a topic that involved subtle argumentation with the vatican. In Rwanda, for the first time in world history, a rapist was convicted for committing a crime against humanity, producing immensely important satisfaction among the hundreds of thousands of victims of rape. Mafwenga, "The Contribution of the International Criminal Tribunal for Rwanda to Reconciliation in Rwanda." p. 16; See also: Ambos, "Zur Bestrafung Von Verbrechen Im Internationalen, Nicht-Internationalen Und Internen Konflikt." p. 344; See also: Wedgwood, "The International Criminal Court: An American View." p. 94.

Court's jurisdiction; a provision designed to give states time to adapt to the ICC's regulations and train their military.²³⁷

3.1 Main Problems

The Statute of the ICC is a product of both a political and a juridical tug war. The implications that the agreement that was settled on will have depend a great deal on the possibilities legally granted in its framework, but not less on political scenarios. It doesn't suffice to consider one of these two sides only. From a juridical point of view, the work is nearly done; the political work required for a successful tool for justice will constantly be necessary. The following chapter addresses the political questions arising from the legal regulations reached.

It was decided to establish an independent court through a treaty. As a result, no amendments to the Charter of the UN were made and the Court will also not be financed through the regular UN budget.²³⁸ Being an independent organ, the ASP holds the responsibility for the Court. Nevertheless, the Court was regarded as connected with the UN. This was also taken up in the Statute, the exact definitions of their cooperations were later decided in an agreement.²³⁹ Frequently found in the scientific literature is the opinion that „(...) the function of the Court is considered to have intrinsic connection with the purposes of the UN, especially with the role of the Security Council.“²⁴⁰ This will be discussed broadly in Chapter 4.1.3.

Roy Lee calls the statute „a product of give and take.“²⁴¹ Others phrase it quite boldly by saying the ICC has „pre-natal shortcomings“.²⁴² The many quite fundamentally opposing views on how much power the court should be given defined the result of the Rome Conference.²⁴³ The conference was torn between the maintenance of the

²³⁷ "Rome Statute of the International Criminal Court," vol. Art. 124, p. 81. See also: Zahnd, "How the International Criminal Court Should Help Implement International Humanitarian Law." p. 46. However, this is only possible in cases where charges of war crimes are being made. Genocide and crimes against humanity are not included in this regulation. Gallón, "The International Criminal Court and the Challenge of Deterrence." p. 102.

²³⁸ Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium*. p. 78. See also: Condorelli and Villalpando, "Relationship of the Court with the United Nations." p. 221.

²³⁹ Condorelli and Villalpando, "Relationship of the Court with the United Nations." p. 221.

²⁴⁰ Ibid. p. 221.

²⁴¹ Lee, "Creating an International Criminal Court - of Procedures and Compromises." p. 147.

²⁴² Ferencz, "The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century." p.

363.

²⁴³ Kirsch, "Introduction." p. 3.

Court's independence and the concern of states over their sovereignty that urged to keep the Court closely under state control. Finding a consensus broad enough to join 60 states in it calls for compromises.²⁴⁴ The most well-known and controversial compromises will be discussed further in the upcoming chapters. The aim is to point out the distinct problems that arise from either solution and elaborate whether the independent well-functioning of the Court has been compromised. „Reflecting the trends of the Conference, the final package is consistent with the ‚like-minded cornerstones‘ espoused by a clear majority of delegations, but with significant features to accommodate the strongly held views of other delegations.“²⁴⁵

The successful operating of the ICC will be dependant on a larger number of factors: its relation to the states parties, that to the non-states parties, to the national courts and legal orders, as well as to the UN-System and specifically to the SC. Considered to be the most important, due to the amount of interference with the Court's work it is granted, will be the relationship with the SC.²⁴⁶

3.1.1 Complementarity

As laid out in Art. 1 of the Statute, the Court's jurisdiction shall be complementary to national jurisdictions.²⁴⁷ In other words, the Court's jurisdiction will enhance national jurisdictions, not replace them. How the admissibility is regulated is described in Art. 17: In the case of a state unwilling or unable to prosecute a crime that, in gravity, would fall under the Court's jurisdiction, it takes over the case.²⁴⁸ The ICC will thus have a more complicated standing since it has to prove the national jurisdiction to be incapable or unwilling, compared to the ICTs whose jurisdiction had primacy over national courts. The authority and legitimacy of the ICTs was de facto, whereas the ICC has to newly decide over its admissibility in every single case. National courts and the ICC hence work antagonistically. Proving its legitimacy can be expected to turn out tedious, unless the government of the concerned state approves of the

²⁴⁴ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium, p. 77.

²⁴⁵ Kirsch, "Introduction." p. 3.

²⁴⁶ Berman, "The Relationship between the International Criminal Court and the Security Council," Reflections on the International Criminal Court. Essays in Honour of Adriaan Bos, eds. Herman A.M. von Hebel, Johan G. Lammers and Jolien Schukking (The Hague: T.M.C. Asser Press, 1999). p. 173.

²⁴⁷ "Rome Statute of the International Criminal Court," vol. Art. 1, p. 2.

²⁴⁸ Kirsch, "Introduction." p. 5.

Court's jurisdiction and complies with it.²⁴⁹ The term complementarity is hence confusing, since it suggests a more favourable partnership, when in fact, the ICC will hamper national courts to a certain extent. Respectively, it also constitutes a mere substitution, since national jurisdictions enjoy priority until it is proven that they need to step back in a particular case.²⁵⁰

The initiation of investigations may set out from the prosecutor, the SC, or any state party. The fact that the Prosecutor can initiate proceedings is essential for the Courts independence, since state parties as well as the SC are very likely to filter political considerations into their conduct with the Court. In order to control the Prosecutor, they need to get approval from the pre-trial chamber before preceding their investigation. In all other cases except referral from the SC, either the affected state on whose territory the crime has been committed or the state of the nationality of the indicted have to accept the jurisdiction of the Court in the case, which constitutes another major compromise made during the Conference of Rome. This acceptance is automatic for state Parties, with the exception of a temporary regulation allowing for a seven-year period of non-automatic consent to the Courts jurisdiction, which is intended to grant the state Parties a period of acclimatization to the Court's jurisdiction. Non-state Parties can too accept the Court's jurisdiction.²⁵¹

The concept of complementarity moots a series of important issues. In order not to impinge upon the principle *ne bis in idem*²⁵², the Court can only exercise its jurisdiction if the responsible national court fails to react. Furthermore, a person convicted by a national court for a capital offense cannot be indicted by the ICC. A case is also unaccusable if investigations or prosecutions have been made by national authorities, even if the outcome of the process was an acquittal. Likewise, a person convicted by the ICC cannot be put on trial by a national court in the same

²⁴⁹ Schabas, An Introduction to the International Criminal Court, Second Edition ed. (Cambridge: Cambridge University Press, 2004). p. 85.

²⁵⁰ Morris, "Complementarity and Its Discontents: States, Victims, and the International Criminal Court," International Crimes, Peace, and Human Rights: The Role of the International Criminal Court, ed. Dinah Shelton (Ardsley, New York: Transnational Publishers, Inc, 2000). p. 181.

²⁵¹ Kirsch, "Introduction." p. 5-6.

²⁵² The principle *ne bis in idem* is codified in Art. 20 of the Rome Statute of the ICC, as well as in human rights treaties such as the International Covenant on Civil and Political Rights. Nowak, U.N. Covenant on Civil and Political Rights. Ccpr Commentary (Kehl Strasbourg
Arlington: N.P. Engel, 1993). Art. 14, p. 233. See also: "Rome Statute of the International Criminal Court," vol. Art. 20, p. 16.

matter.²⁵³ In the special case of a conviction followed by an amnesty the ICC is also not authorized to intervene²⁵⁴, unless the constitutional quality of the proceeding is doubted. The *ne bis in idem* principle will only be overridden if the interdiction of double jeopardy is being utilized in order to protect the convict from prosecution through an independent court.²⁵⁵ Whether a genuine prosecution has taken place is ultimately decided by the Court.²⁵⁶ A number of states supported the case of a significantly weaker court, suggesting that once „any state had assumed jurisdiction, irrespective of its subsequent conduct“²⁵⁷, it should be granted jurisdiction. Such a court would literally have been useless, since protecting individuals from prosecution would have been made facile.²⁵⁸ So states do give up on sovereignty, despite a number of available loopholes. „In joining the court, they agree to be bound by a process with defined rules but no guarantees.“²⁵⁹

The concept of complementary jurisdiction was proposed by the ILC in its draft in 1994. Many have criticized it heavily, among them former prosecutor of the ICTY and ICTR Louise Arbour. Since the legal order of a least developed country is most likely not as elaborate as that of a more developed country, this construction could easily be unfavourable towards the former. Proving the legal system of an LDC to be ineffective and thus unable will, applying higher developed standards, not be much of a challenge. This provision could easily be interpreted as disadvantageous for poor countries and beneficial to richer, yet corrupt or malfunctioning states with a fully developed legal order.²⁶⁰ This construction of the concept of complementarity could thus lead to an asymmetrical usage of the Court. Analogue to the dominance of power on national levels, critics suspect a likewise line of action on the international level. ‚Rogue states‘ as well as less developed ones run into danger of having delinquency attributed to them rather than to the more powerful members of the

²⁵³ Schabas, An Introduction to the International Criminal Court. p. 88f.

²⁵⁴ This was the case with the war criminal William Calley who was held responsible, among others, for the My Lai massacre in Vietnam. Ibid. p. 88.

²⁵⁵ Reese, "Fünf Offene Fragen Zum Internationalen Strafgerichtshof - Und Der Versuch Einer Antwort." p. 78. See also: Kirsch, "Introduction." p. 6.

²⁵⁶ Sewall, Kaysen and Scharf, "The United States and the International Criminal Court: An Overview." p. 3.

²⁵⁷ Kirsch, "Introduction." p. 5.

²⁵⁸ Ibid. p. 5.

²⁵⁹ Sewall, Kaysen and Scharf, "The United States and the International Criminal Court: An Overview." p. 3.

²⁶⁰ Schabas, An Introduction to the International Criminal Court. p. 86.

international community.²⁶¹ The ICC's jurisdiction will span over more than 100 countries, of which not all share a common or comparable legal order. It seems that this regulation provokes an uneven treatment, even more so, it could impinge upon some national legal systems with unforeseen and disproportionate severity.²⁶² In three of the four cases the ICC is currently investigating, all situated on the African continent, the states themselves asked the Court to intervene. The concerned states, the Central African Republic, the Democratic Republic of Congo and Uganda signed and ratified the Statute of Rome. Opinions differ on whether or not the Court's emphasis is rightfully concentrated on Africa solely. Ms. Fatou Bensouda, deputy to the chief prosecutor, defends this by saying that Africa constitutes the most gravely deprived area and is thus rightfully the focal point of the Court's action, at least at the moment.²⁶³ Considering that Sudan presents the only case in which the Court intervened unsolicitedly, the reproach of the principle of complementarity affecting less developed countries doesn't sustain, at least not yet. It will be necessary to observe the ICC's future work in order to evaluate the question of fairness that is raised by the principle of complementarity.

3.1.2 The Status of the Individual

The ICC's jurisdiction can be initiated, as elaborated in the previous chapter, by either the SC, the chief prosecutor in accordance with the pre-trial chamber, or any state party. An indictment via an individual is not precluded and could take place via the prosecutor who starts investigations after taking notice of the individual, but is also not explicitly designated as a manner in which prosecution is triggered.²⁶⁴

International criminal jurisdiction in its present form thus embodies a structurally authoritarian judiciary that is detached from the social basis. It obliges the individual to stick to certain norms without granting it the possibility to engage the law that binds

²⁶¹ Reese, "Fünf Offene Fragen Zum Internationalen Strafgerichtshof - Und Der Versuch Einer Antwort." p. 84.

²⁶² Schabas, *An Introduction to the International Criminal Court*. p. 86f.

²⁶³ Simons, "Gambian Defends the International Criminal Court's Initial Focus on Africans," *Herald Tribune* February 26, 2007, <http://www.nytimes.com/2007/02/26/world/africa/26hague.html?scp=5&sq=international%20criminal%20court&st=cse>

²⁶⁴ Tolmein, "Strafrecht Als Instrument Zur Schaffung Von Frieden: Das Beispiel Des Icty," *Humanitäres Völkerrecht. Politische, Rechtliche Und Strafgerichtliche Dimensionen*, eds. Jana Hasse, Erwin Müller and Patricia Schneider, Demokratie, Sicherheit, Frieden (Baden-Baden: Nomos, 2001). p. 496.

them for their own purpose. The individual can be prosecuted, but cannot induce prosecution. On the other hand, the statutory offenses of the ICC are not newly criminalized: all four categories of crimes are acknowledged as crimes according to the law of nations.²⁶⁵ Some states even pronounced against the prosecutor's right to initiate investigations solely in accordance with the pre-trial chamber. If their wish had prevailed, the individual would have been entirely detained from entering the process of international criminal jurisdiction.²⁶⁶

The chosen direction reflects the trend of the development of the law of nations. While states continue to form the mainly addressed parties in the law of nations, NGOs and international organisations such as the WTO have gained in legal importance. The status of individuals has increasingly been enhanced from being mere objects in the law of nations to being enabled to address international bodies directly in order to assert their claims when their rights have been violated. According to constructivism, gradually a variety of actors rise to form the international community, replacing the dominant realist picture of a state-only arena.²⁶⁷

The strengthening of the individual's position is a direct consequence of the upsurge of human rights which have influenced every field of international law.²⁶⁸ These rights, however, remain indirect, since the individual is still dependant on its state to acknowledge its rights within international treaties and conventions.²⁶⁹ „At the end of the day it is still states which sign the treaties.“²⁷⁰ The position of the individual thus changed from the position of being protected without having the possibility of seizing the initiative, to being individually criminally liable. The growing concern for the individual is closely linked with the growing concern for the victims. The evolution of a global conscience has set off the understanding of human rights as essential;

²⁶⁵ Ibid. p. 495f.

²⁶⁶ Gallón, "The International Criminal Court and the Challenge of Deterrence." p. 103.

²⁶⁷ Lemke, Internationale Beziehungen. Grundkonzepte, Theorien Und Problemfelder. Table of Theories, p.48.

²⁶⁸ Mekhemar, "The Status of the Individual in the Statute of the International Criminal Court," The Rome Statute of the International Criminal Court: A Challenge to Impunity, eds. Mauro Politi and Giuseppe Nesi (Aldershot: Ashgate Publishing Limited, 2001). p. 123.

²⁶⁹ Tolmein, "Strafrecht Als Instrument Zur Schaffung Von Frieden: Das Beispiel Des Icty." p. 495.

²⁷⁰ Meintjes, "Domestic Amnesties and International Accountability," International Crimes, Peace, and Human Rights: The Role of the International Criminal Court, ed. Dinah Shelton (Ardsey, New York: Transnational Publishers, Inc, 2000). p. 91.

criminal justice is a coherent measure in this enforcement process.²⁷¹ The individual doesn't reach an equal position within the framework of the ICC, but the opportunities given to victims in the framework of the ICC are still bigger than in previous arrangements, as will be discussed further in chapter 5.1.2. Also on the part of the accused, the legal framework has come a long way since the trials after World War II to ensure fair trials.²⁷²

3.1.3 The Role of the Security Council

How the relationship between the SC and the Court should function ideally has been a highly debated point on the agenda for the establishment of a permanent international criminal court. The question as to how the relationship should be established touches on the matter of the fine line between peace and security in the sense of the UN Charter. The amount of power that ought to be given to the SC was – as mentioned before – broadly discussed in Rome, also in view of the far more widespread control it enacted over the ICTY and ICTR. The resistance to give the SC more powers – also in terms of enforcement – though, was very big, resulting in the regulation that was settled on.²⁷³ The compromise was called Singapore compromise, based on a proposal made by Singapore.²⁷⁴ Roy Lee calls the chosen path 'a twin approach'²⁷⁵ in which both institutions can assist each other.

Berman suggests that the ICC's relationship to the SC can be described as consisting of three pillars: the positive, the negative, and the hidden pillar, regulated in Art. 13(b), Art. 16 and Art. 5. The relationship of the two will form around these pillars.²⁷⁶ The first pillar is embodied in Art. 13 which entitles the SC to refer a situation to the prosecutor. Art. 13(b), regulating the exercise of jurisdiction, arranges the following: „A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter

²⁷¹ McKay, "Are Reparations Appropriately Addressed in the Icc Statute?," International Crimes, Peace, and Human Rights: The Role of the International Criminal Court, ed. Dinah Shelton (Ardsley, New York: Transnational Publishers, Inc, 2000). p. 164.

²⁷² Mekhemar, "The Status of the Individual in the Statute of the International Criminal Court." p. 130.

²⁷³ Hafner, Boon, Rübesame and Huston, "A Response to the American View as Presented by Ruth Wedgwood," European Journal of International Law 10 (1999). p. 121f.

²⁷⁴ Schabas, An Introduction to the International Criminal Court. p. 83.

²⁷⁵ Lee, "Creating an International Criminal Court - of Procedures and Compromises." p. 149.

²⁷⁶ Berman, "The Relationship between the International Criminal Court and the Security Council." p. 173.

VII of the Charter of the United Nations.²⁷⁷ Thus, the SC is entitled, third next to referral by a state party or initiation of investigation by the Prosecutor, to instruct the Court to take actions.²⁷⁸ This is “to empower *the Court*, not the Council.”²⁷⁹ The spheres of politics and law still remain separated, as the SC refers a *situation*, not a case. The SC thus refers a situation to the prosecutor, who, on this basis, begins to investigate. This way the independence of the prosecutor is preserved, whether charges are made stays only in their competence to decide (given the approval of the pre-trial chamber).²⁸⁰ The fact that the SC has been given that much power could be of great help to the Court: In cases of referral through the SC, it is entitled to make use of enforcement measures under Chapter VII of the Charter: all member states of the UN would then have to subject to UN orders.²⁸¹ This provision is indeed as controversial as it sounds. Further discussion on it will follow in Chapter 4.2.1.

Meanwhile, for the opposite case the SC has been given regulatory powers over the Court as well. If the SC considers its own activities as paramount to those of the Court, it can stall the Court’s activities.²⁸² This entitlement to request deferral constitutes the negative pillar. The deferral of investigation or prosecution is regulated in Art. 16, stating that „no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”²⁸³ The request for deferral affects both investigations that were about to be made as well as prosecutions that are already being proceeded.²⁸⁴ Art. 16 was established on the basis of doubts issued by the permanent members of the SC regarding the question of authority in international peace-keeping and peace-establishment. While the SC intends to work on diplomatic

²⁷⁷ "Rome Statute of the International Criminal Court," vol., Art. 13(b), p. 11.

²⁷⁸ Art. 13(a) and (b) regulates the exercise of jurisdiction in all three cases, „if (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.“ Ibid., vol. Art. 13(a) and (b), p. 11.

²⁷⁹ Berman, "The Relationship between the International Criminal Court and the Security Council." p. 174.

²⁸⁰ Ibid. p. 174.

²⁸¹ Kirsch, "Introduction." p. 5.

²⁸² Lee, "Creating an International Criminal Court - of Procedures and Compromises." p. 149.

²⁸³ "Rome Statute of the International Criminal Court," vol. Art. 16, p. 12.

²⁸⁴ Lee, "Creating an International Criminal Court - of Procedures and Compromises." p. 149.

resolutions of conflicts, the Court's mission is to clarify the facts.²⁸⁵ Critical voices thus demanded to assign the SC the competence to automatically exclude the Court's jurisdiction.

The SC thus has the power to force the Court to subject to it, if it regards this as necessary in order to preserve or establish peace.²⁸⁶ This approach reflects the view that the SC, in its function as the highest international institution designed to guard worldwide peace and security, must have priority over the ICC and other institutions established in order to attain the same goal.²⁸⁷ A court is designed to establish peace, hence, it should not get in conflict with the institution that predominantly aims for this goal.²⁸⁸ The SC's power within the Statute of the Court is justified by the following advantages resulting from it: The SC can refrain from establishing *ad hoc* tribunals whenever a situation requires UN action. On the other hand, it gives the prosecutor a profound back-up when starting the investigations.²⁸⁹ According to Louise Arbour, former prosecutor of the ICTs, the prosecutor will need this empowerment through the SC badly: She evaluates the powers the prosecutor of the ICC derives from the Statute as fairly limited. According to Arbour, the Prosecutor will have better perspectives when investigating on behalf of the SC in order to be able to investigate adequately at all. In fact, referrals by the SC could be of advantage to the Court: being backed up by the SC, the Court can expand its jurisdiction, let alone the augmenting effect a close cooperation will have on the financial resources of the ICC.²⁹⁰

However, the relationship between the SC and the Court bears the possibility of being politically charged. The permanent members of the SC are clearly given a more privileged position than all other states. Even more so, since Art. 16 empowers

²⁸⁵ Arsanjani, "Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court," Reflections on the International Criminal Court. Essays in Honour of Adriaan Bos, eds. Herman A.M. von Hebel, Johan G. Lammers and Jolien Schukking (The Hague: T.M.C. Asser Press, 1999). p. 71f.

²⁸⁶ Berman, "The Relationship between the International Criminal Court and the Security Council." p. 175f.

²⁸⁷ Lee, "Creating an International Criminal Court - of Procedures and Compromises." p. 149f.

²⁸⁸ Berman, "The Relationship between the International Criminal Court and the Security Council." p. 174f.

²⁸⁹ Lee, "Creating an International Criminal Court - of Procedures and Compromises." p. 149.

²⁹⁰ Arbour and Bergsmo, "Conspicuous Absence of Jurisdictional Overreach," Reflections on the International Criminal Court. Essays in Honour of Adriaan Bos, eds. Herman A.M. von Hebel, Johan G. Lammers and Jolien Schukking (The Hague: T.M.C. Asser Press, 1999). p. 139.

the SC and thus the same states to ward off charges.²⁹¹ A positive resolution to request a deferral is required, which smoothed ruffled feelings among the states not in favour of this asymmetric solution. If one of the permanent members makes use of their right to veto a deferral of investigation, the process can proceed.²⁹² For the opposite case of a referral of a situation to the ICC a voting majority in the SC is necessary.²⁹³ Hence, the issue of the court's independence is touched. The voting system and the hierarchy within the UN and the SC advise against the implementation of this already existing organ as authority over enforcement.²⁹⁴ „The abuse of the veto has, for many years, frustrated all hopes to consider the Council as the custodian for the application of the rule of law.“²⁹⁵ And further, up until the present, the Five „are against all forms of limitations on the veto including the call for any form of norm setting and faithful application of the rules of the procedure of the Council.“²⁹⁶

Higgins mentions that the compromises made in the Statute provide for a much weaker function of the SC in the Court than what had been originally planned.²⁹⁷ Already the ILC had been unsure about how to regulate these relations: in its draft the ILC had envisioned a restraint for the Court to follow investigations in matters that were on the agenda of the SC, suggesting an “automatic bar on commencing a prosecution arising from a situation being dealt with by the SC under Chapter VII of the Charter, unless the Council itself decided otherwise.”²⁹⁸ This would have meant a

²⁹¹ Berman, "The Relationship between the International Criminal Court and the Security Council." p. 175.

²⁹² Farer, "Restraining the Barbarians: Can International Criminal Law Help?." p. 117. See also: Higgins, "The Relationship between the International Criminal Court and the International Court of Justice," Reflections on the International Criminal Court. Essays in Honour of Adriaan Bos, eds. Herman A.M. von Hebel, Johan G. Lammers and Jolien Schukking (The Hague: T.M.C. Asser Press, 1999). p. 167; Gallón, "The International Criminal Court and the Challenge of Deterrence." p. 102.

²⁹³ Berman, "The Relationship between the International Criminal Court and the Security Council." p. 175.

²⁹⁴ Elaraby, "The Role of the Security Council and the Independence of the International Criminal Court: Some Reflections," The Rome Statute of the International Criminal Court. A Challenge to Impunity, eds. Mauro Politi and Giuseppe Nesi (Aldershot: Ashgate Publishing Limited, 2001). p. 43.

²⁹⁵ Ibid. p. 43. It is ironic in this context, that the ICJ, being an UN Organ itself while the ICC isn't, enjoys far more independence from the SC than the latter. For useful discussion, see Elaraby, "The Role of the Security Council and the Independence of the International Criminal Court: Some Reflections." p. 44-47.

²⁹⁶ Elaraby, "The Role of the Security Council and the Independence of the International Criminal Court: Some Reflections." p. 47.

²⁹⁷ Higgins, "The Relationship between the International Criminal Court and the International Court of Justice." p. 167.

²⁹⁸ Berman, "The Relationship between the International Criminal Court and the Security Council." p. 177.

complete gridlock on the Court's activity. States would have been given the opportunity to abuse the law by putting a matter on the agenda in order to protect it from investigation. Considering that the permanent members have the right to veto, matters could have remained on the agenda forever. This regulation would have made the Court a pawn in the hands of the powerful and reduced it to absurdity, considering that neither would it have been impartial nor independent. Art. 16 constitutes a major improvement compared to earlier drafts.²⁹⁹ The US suggested a veto power for all permanent members of the SC over prosecutions, which would have meant the ultimate death blow for the Court in its purpose to work independently and effectively. The only conflicts that would ever be solved by such a court would involve the few countries on earth that are not protected by either of the five major powers. Further, of course, these major powers would be granted impunity authorized by the law in force, which would amount to a disastrous and almost ridiculous injustice.³⁰⁰

The entire debate raises one specific question: *Should* the Court be given the possibility to surpass the Security Council's power? It must be admitted that criminal prosecution might not always be in the interest of a remedy for the conflict.³⁰¹ Given the case that the ICC required permission by the SC to initiate investigations, as so desired by the US, the Court would be less torn between its inherent duty to punish the perpetrators of certain crimes and not to intervene in processes of transformation that could be disrupted and thrown back in their development. Of course, if that were the case, the ICC's would fulfill its duty to create justice in a completely selective and arbitrary manner.³⁰² Nevertheless, the asymmetric distribution of power in the international relations continues throughout the structure of the ICC. The regulations in Art. 16 and Art. 13 do give the permanent members of the SC a touch of possible

²⁹⁹ Schabas, An Introduction to the International Criminal Court. p. 82ff.

³⁰⁰ Neier, "An International Court That America Could Back," Herald Tribune June 30, 1998, <http://www.iht.com/articles/1998/06/30/edneier.r.php>

Neier further: „ Just think how the U.S. version would have worked had there been such a Court when the crimes it could prosecute — genocide, crimes against humanity, war crimes — were committed in past conflicts. Russia could have vetoed prosecution of Serbs for crimes in Bosnia, or of Saddam Hussein for using poison gas against Kurds. France could have blocked prosecution of Rwandan officials for the 1994 genocide. China could have turned thumbs down on a trial of Pol Pot and his Khmer Rouge colleagues for the Cambodian holocaust. Britain could have stopped the prosecution of Nigerian officials for the Biafra slaughter. And the United States could have ensured that the leaders of the death squads of the 1980s in El Salvador were never brought to trial.“ Neier, "An International Court That America Could Back,"

³⁰¹ Schabas, An Introduction to the International Criminal Court. p. 82ff.

³⁰² Farer, "Restraining the Barbarians: Can International Criminal Law Help?." p. 116f.

impunity or at least a better chance at it.³⁰³ In many respects the debate about the competence of the SC in the ICC was a conflict between the permanent members of the SC and all other states.³⁰⁴ It follows the tradition of 'All states are equal, but some are more equal'. However, the UK, being a permanent member of the SC and a major world power, prominently engaged itself in the group of like-minded states in favour of a strong court. Minimal powers for the SC were postulated by various developing states.³⁰⁵

Frankly, the SC itself is an organ with immense capacities for political play-offs. Establishing it as a serious and capable instrument of international politics engaged a long period of time. The Cold War has shown that an entirely disempowered SC will block any progress in the international arena, specifically in the field of international criminal prosecution. Weaving a new institution dedicated to international security and justice into the already existing architecture seems to be sound. The price for this scenario is inevitably at least better chances at impunity for specific powerful states, however, having precisely these states on board will give the ICC more coverage. Still, the fact that with the current compromise members of the SC are given the power to press charges and block investigations while themselves not being accountable does amount to a situation very contrary to reason.

A coordinated performance between the ICC and the UN would be desirable. By reaffirming the principles of the UN Charter in the Statute of Rome and the powers that were attributed to the SC in Art. 13 and Art. 16, it appears a solid groundwork for a good cooperation was laid. For an effective work of the ICC the connecting link to the SC is seemingly essential. The UN can act as a donor of moral support as well as material support. From an administrative point of view, the ASP can meet in the UN headquarters, and further financing of the Court partly resides with the UN. The ICC can be made more effective through this backup of the UN. The prosecutor will have less of a hard lot investigating in areas where UN peacekeeping missions are stationed. The UN can grant the implementation of ICC measures, both in cases of a reluctant member state as well as through ongoing support of the Court. The

³⁰³ Gallón, "The International Criminal Court and the Challenge of Deterrence." p. 102.

³⁰⁴ Schabas, An Introduction to the International Criminal Court. p. 82ff.

³⁰⁵ Kirsch, "Introduction." p. 3.

connection between these institutions seems necessary for the ICC to be able to fulfil its purpose.³⁰⁶

Regarding the patronage of the SC, many scholars expect the SC to empower the Court and the Prosecutor in cases of referral through Art. VII of the Charter in order not to let the ICC become weaker than the *ad hoc* tribunals. In this way, a dynamic of cooperation and compliance should be achieved.³⁰⁷ Others, on the other hand, consider support for the ICC through the SC a very unlikely scenario. The potential does exist, but should not be overestimated.³⁰⁸ Political tactics by permanent members of the SC have attributed unsteady support to the ICTY as well, thus it is hardly imagineable that the ICC should have a different fate. Especially interesting is the aspect of the US in the SC. Will it refer situations to the ICC when the USA will act as a logjam? There has been a change in the climate of the SC, but it sustained „its role as a bulwark of the international rule of law.“³⁰⁹ Broomhall goes as far as saying that the ICC is not even granted the doubtful support of the SC.

3.2 The USA and the ICC

Almost all major powers outside of Europe refused to sign the Statute of Rome. The American opposition, however, is particularly extraordinary, since all of America's allies support it. Moreover, the USA has proven to be an advocate of human rights and put a lot of weight and money in the process of exporting its values, especially throughout the recent administrations. One line of argument assumes that international contributions to security must be in favour of American security politics, since they denote a boost for American security as well.³¹⁰ However, the US feels it holds a special position being the only superpower and thus exposed to a larger-than-average amount of danger that uncontrolled hatred could be focused on it.³¹¹

³⁰⁶ Condorelli and Villalpando, "Relationship of the Court with the United Nations." p. 222.

³⁰⁷ Arbour and Bergsmo, "Conspicuous Absence of Jurisdictional Overreach." p. 139.

³⁰⁸ Gallón, "The International Criminal Court and the Challenge of Deterrence." p. 101.

³⁰⁹ Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law, p. 161.

³¹⁰ Sewall, Kaysen and Scharf, "The United States and the International Criminal Court: An Overview." p. 2.

³¹¹ Knowlton and Fuller, "Europe Opposes World Court Exceptions: After War, a New Rift between U.S. And Eu," Herald Tribune June 11, 2003, http://www.iht.com/articles/2003/06/11/allies_ed3__2.php?page=1

The basis of the divide the ICC has produced with the US are two very distinct views on enforcement policies for human rights. While the Court exemplifies a collective model, the US prefer a unidirectional enforcement strategy.³¹² Buzzwords such as ‚sovereignty‘ and ‚constitutionality‘ are chipped into the discourse about the ICC to outplay it.³¹³ Ruth Wedgwood has, along with other authors, defended the American view on the ICC, listing the reasons that keep the USA from supporting the newfound Court. She lists „the problem of amnesties in democratic transitions, the necessary role of the Security Council in UN security architecture (...) the role of consent as a treaty principle and third party jurisdiction, the handling of treaty amendments, and the inclusion of ‚aggression‘ as a crime with no agreement on its definition“, as well as „the necessary role of the United States in providing effective enforcement of ICC judgements“³¹⁴ as the main problems demanding further improvement.

Clinton and former foreign minister Albright envisioned themselves as pioneers for a permanent court in 1997 but reversed their views.³¹⁵ The treaty was signed by the USA under the Clinton Administration on the last day it was open for signature, December 31, 2000, who nevertheless dissuaded his successor from ratifying it.³¹⁶

Calling the american approach to the ICC under Clinton ‚cautious engagement‘, the Bush Administration’s position towards it can be best described with ‚outright opposition‘³¹⁷ or ‚undisguised hostility‘.³¹⁸ The deferral of investigation or prosecution according to Art. 16 was misapplied by the US in July 2002, days after the entering into force of the Statute. By announcing to veto every upcoming peacekeeping missions unless the SC would make use of its power under Art. 16 and exclude

³¹² Mayerfeld, "Who Shall Be Judge? The United States, the International Criminal Court, and the Global Enforcement of Human Rights." p. 93.

³¹³ Sewall, Kaysen and Scharf, "The United States and the International Criminal Court: An Overview." p. 13.

³¹⁴ Wedgwood, "The International Criminal Court: An American View." p. 93.

³¹⁵ Schneider, Internationale Gerichtsbarkeit Als Instrument Friedlicher Streitbeilegung. Von Einer Empirisch Fundierten Theorie Zu Einem Innovativen Konzept. p. 131f.

³¹⁶ Mayerfeld, "Who Shall Be Judge? The United States, the International Criminal Court, and the Global Enforcement of Human Rights." p. 95. See also: Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium. p. 43. See also: Bindman, "Washington and the International Court: Illegal U.S. Campaign against International Justice," See also: Cohen, "A Court for a New America," Herald Tribune December 3, 2008, <http://www.nytimes.com/2008/12/04/opinion/04Cohen.html?scp=7&sq=international%20criminal%20court&st=cse>

³¹⁷ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium. p. 43.

³¹⁸ Mayerfeld, "Who Shall Be Judge? The United States, the International Criminal Court, and the Global Enforcement of Human Rights." p. 95.

persons, whose state had not ratified the Statute, and who were involved in missions authorised by the UN itself from prosecution by the Court, it railroaded Res. 1422.³¹⁹ Res. 1422 had been adopted 15-0, after the US had threatened to withdraw its peacekeeping troops from Bosnia.³²⁰ In many legal opinions, this resolution constitutes "an ugly example of bullying by the United States, and a considerable stain on the credibility of the Security Council."³²¹ The UK and France also signed bilateral agreements with Afghanistan to protect their peacekeeping nationals from prosecution through the Court. However, these agreements are more limited than the American one, which includes also government officials and contract workers.³²²

After Bush withdrew Clinton's signature, congress passed the 'American Servicemembers' Protection Act of 2002' (ASPA) which blocks the participation of American citizens in peacekeeping operations in countries that have ratified the treaty, as well as cancels military aid to states-parties if they don't agree to sign a bilateral immunity agreement (BIA) with the US on the non-extradition of US citizens to the ICC. Further, ASPA regulates military operations to intervene in cases with US citizens in ward at the ICC. A number of such bilateral treaties has already been established.³²³ The question as to whether it is even possible for a state to sign a

³¹⁹ Schabas, An Introduction to the International Criminal Court. p. 83. See also: Mayerfeld, "Who Shall Be Judge? The United States, the International Criminal Court, and the Global Enforcement of Human Rights." p. 95. „*Acting* under Chapter VII of the Charter of the United Nations, 1. *Requests*, consistent with the provisions of Article 16 of the Rome Statute, that the ICC, if a case arises involving current or former officials or personnel from a contributing State not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation, shall for a twelve-month period starting 1 July 2002 not commence or proceed with investigation or prosecution of any such case, unless the Security Council decides otherwise;
2. *Expresses* the intention to renew the request in paragraph 1 under the same conditions each 1 July for further 12-month periods for as long as may be necessary;" "Resolution 1422," ed. United Nations Security Council (Distr.: General: <http://www.un.org/Docs/scres/2002/sc2002.htm>, 2002), vol.

³²⁰ Knowlton and Fuller, "Europe Opposes World Court Exceptions: After War, a New Rift between U.S. And Eu,"

³²¹ Schabas, An Introduction to the International Criminal Court. p. 85.

³²² Knowlton and Fuller, "Europe Opposes World Court Exceptions: After War, a New Rift between U.S. And Eu,"

³²³ "American Service-Members' Protection Act of 2002," ed. Bureau of Political-Military Affairs (<http://www.state.gov/t/pm/rls/othr/misc/23425.htm>, 2002), vol. (17.4. 2009)
See also: Mayerfeld, "Who Shall Be Judge? The United States, the International Criminal Court, and the Global Enforcement of Human Rights." p. 95. See also: Bindman, "Washington and the International Court: Illegal U.S. Campaign against International Justice," See also: Kavanaugh, "Bush Ignored Iraq's Sovereignty," Herald Tribune November 18, 2008, <http://www.heraldtribune.com/article/20081118/LETTERS/811180317>
See also: Knowlton and Fuller, "Europe Opposes World Court Exceptions: After War, a New Rift between U.S. And Eu," See also: Cohen, "A Court for a New America,"

bilateral treaty with the US agreeing not to extradite its citizens to the Court without breaching international law is being examined by scholars. In case of a surrender request to the Court, the US could infringe on the Vienna Convention on the Law of Treaties.³²⁴ The US counters this by drawing upon Art. 98(2) of the Rome Statute that was designed with regard to existing agreements.³²⁵ In fact, however, not the question of how to interpret Art. 98(2) is the real problem, but the legitimacy of the Court altogether that is being circumvented by this attempt.

The European countries immediately took an unequivocal stand on this issue by agreeing not to sign such a treaty.³²⁶ Even future EU-states, though small, such as Latvia and Slovenia, have withheld their cooperation to the US in order to comply with the then ongoing EU-application process.³²⁷ „Aspirant countries must follow the club's rules“³²⁸, so a European Union spokesman on the issue. The US explicitly threatened the EU, in particular candidate countries from the former Eastern Block.³²⁹

See also: "Status of Us Bilateral Immunity Agreements (Bias)," ed. CICC - Coalition for the International Criminal Court (<http://www.iccnw.org/?mod=bia>, 2006), vol.

See also: "Us Bilateral Immunity Agreements or So-Called 'Article 98' Agreements," ed. CICC-Coalition for the International Criminal Court (<http://www.iccnw.org/?mod=bia>, 2006), vol.

³²⁴ However, Art. 18 regulating the „Obligation not to defeat the object and purpose of a treaty prior to its entry into force“ states that „A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.“ "Vienna Convention on the Law of Treaties," ed. United Nations (Vienna: 1969), vol. p. 8.

The Bush administration made it crystal clear that it did not intend to sign the treaty.

³²⁵ „The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.“ "Rome Statute of the International Criminal Court," vol. Art. 98(2), p. 69. See also: Bindman, "Washington and the International Court: Illegal U.S. Campaign against International Justice,"

³²⁶ Bindman, "Washington and the International Court: Illegal U.S. Campaign against International Justice," See also: Knowlton and Fuller, "Europe Opposes World Court Exceptions: After War, a New Rift between U.S. And Eu,"

³²⁷ Bindman, "Washington and the International Court: Illegal U.S. Campaign against International Justice," , Knowlton and Fuller, "Europe Opposes World Court Exceptions: After War, a New Rift between U.S. And Eu," See also: Knowlton and Fuller, "Europe Opposes World Court Exceptions: After War, a New Rift between U.S. And Eu," See also: "Countries Opposed to Signing a Us Bilateral Immunity Agreement (Bia): Us Aid Lost in Fy04 & Fy05 and Threatened in Fy06," ed. CICC-Coalition for the International Criminal Court (<http://www.iccnw.org/?mod=bia>, 2006), vol.

³²⁸ Diego de Ojeda is quoted in: Knowlton and Fuller, "Europe Opposes World Court Exceptions: After War, a New Rift between U.S. And Eu,"

³²⁹ Ibid. „Lawrence Rossin, the U.S. ambassador to Croatia, wrote in an essay posted on the embassy's Web site that Croatia ,could forfeit up to \$19 million in military equipment and training

The actual benefit of these agreements is not known, they „seem to flout international law merely to show who is master.“³³⁰ A few European Countries suggested they would accept the US approach, if the US undertook a sign to demonstrate that this would not be equal to granting impunity. Still, even if the US augured to investigate and prosecute possible perpetrators, the ICC's authority and legitimacy would nonetheless be openly peached, as it circumvents its main purpose: to be able to control national governments in their handling of these major crimes. Without acceptance of the US for that principle, its efforts to claim validity of Art. 98(2) for its endeavour constitutes a demand for impunity for American citizens.³³¹ As a comparable example for a compromise in such issues qualifies the matter of murder suspects extradited to the US: This so happens in many cases only under the condition of the non-appliance of the death penalty; something the US shrinks from doing so but still agrees to.³³² So similarly, the US could recognize the jurisdiction of the ICC and understand that no state can, with a clear conscience, extradite a US convict to the US when a feigned prosecution is to be expected.³³³

To the observer, a reticent attitude of the court towards the USA concerning possible criminal activity in the ongoing war in Iraq is apparent; an approach also advised throughout much of the relevant literature.³³⁴ Richard Perle, chairman of the Defense Policy Board Advisory Committee from 2001 to 2003 under the Bush administration, publicly admitted that the war against Iraq infringed on international law and many

assistance should it fail to sign an Article 98 agreement or receive a presidential waiver by July 1, 2003.” Knowlton and Fuller, "Europe Opposes World Court Exceptions: After War, a New Rift between U.S. And Eu,"

³³⁰ Bindman, "Washington and the International Court: Illegal U.S. Campaign against International Justice,"

³³¹ Roth, "International Criminal Court: Resist Washington's Arm-Twisting," Herald Tribune September 30, 2002, http://www.iht.com/articles/2002/09/30/edroth_ed3_.php

³³² Further, (former) British defense secretary, Geoff Hoon, declared that in case British troops were to capture Osama Bin Laden, the European Convention on Human Rights would interdict an extradition to the US where he would receive the death penalty. Trying Bin Laden and his accomplices before an international court would be a vital sign showing that the attacks on the US constituted a crime against humanity altogether. If, however, Bin Laden and comparable convicts were to be caught by the US, it is very unlikely that they would extradite them to an international court and not try them themselves, to which they are entitled to according to international law. Zan, "Mass Killers Should Be Tried in an International Criminal Court," Herald Tribune December 13, 2001, http://www.iht.com/articles/2001/12/13/a7_2.php

³³³ Roth, "International Criminal Court: Resist Washington's Arm-Twisting,"

³³⁴ Kaul, "Der Internationale Strafgerichtshof - Stand Und Perspektiven," Vom Recht Der Macht Zur Macht Des Rechts? Interdisziplinäre Beiträge Zur Zukunft Internationaler Strafgerichte, eds. Frank Neubacher and Anne Klein, Kölner Kriminalwissenschaftliche Schriften (Berlin: Duncker & Humblot, 2006). p. 95f.

However, chief prosecutor Moreno-Ocampo abnegated the intention to prosecute British troops in Iraq in front of the ICC. Cohen, "A Court for a New America,"

scholars are of the opinion that the war constituted a crime of aggression. This crime however, as mentioned before, lacks a definition. Therefore, no action can be expected before 2010 when the review conference will be held and amendments to the Statute could be made. It is still open whether the US will attend this conference in order to join negotiations over possible further directions the Court will take on issues such as drugtrafficking and terrorism that are up for decision.³³⁵

In the past, the USA were widely supportive of the establishment of the ICTY and ICTR.³³⁶ These tribunals are generally viewed as predecessors leading to the establishment of a permanent court, in the process of which the USA were similarly intensively integrated.³³⁷ During the Cold War, the US were highly in favor and involved in the regularization of the international sphere, a strategy to keep the Soviets under control.³³⁸ These current attempts to undermine the legitimacy of the ICC sends the signal to the world, that the US doesn't accept international law if it doesn't suit their purpose, and that the US will make use of their powerful standing to show this.³³⁹ Schabas argues that, „in practice, Res. 1422 will probably not prove to be a serious obstacle to the fulfilment of the Court's solemn mission.“³⁴⁰ How much of a stumbling block it will de facto constitute will turn out in the Court's future work. What Res. 1422 unequivocally signalizes, though, is that the USA stands firm on its self-conception of a superpower that moves outside of the arena. Objections to the Court by the USA were explained with concerns to the national security and public law and order.³⁴¹ Naturally, by ratifying the Statute, the ICC is given the power to interfere in the law and order of states, but, to the same degree in all states. By excluding itself from a concession a great number of states agreed to make, it demands its own rules for itself. The biggest harm resulting from this is of a symbolic kind. As elaborated in Chapter 1.1.9, the Arab League immediately united behind Sudan's president al-Bashir in an attempt to defend what they perceived as an

³³⁵ Cohen, "A Court for a New America,"

³³⁶ Zwanenburg, "The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?" p. 125. See also: Sewall, Kaysen and Scharf, "The United States and the International Criminal Court: An Overview." p. 3.

³³⁷ Zwanenburg, "The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?" p. 125.

³³⁸ Sewall, Kaysen and Scharf, "The United States and the International Criminal Court: An Overview." p. 2.

³³⁹ Roth, "International Criminal Court: Resist Washington's Arm-Twisting,"

³⁴⁰ Schabas, An Introduction to the International Criminal Court. p. 85.

³⁴¹ Blanke, "Der Internationale Strafgerichtshof." p. 151.

unequal treatment. To criticize that international law makes Sudan discharge its duties while ignoring the war in Iraq and the politics of Israel in the near east is fair enough. Most of all, due to US support for al-Bashir's indictment. Not letting itself be bound by the ICC but supporting its approach in other countries is a position that, not very surprisingly, is met with criticism around the world.³⁴²

Regarding the interaction of the ICC with the SC, Wedgwood argues that the latter is not given an adequately significant role in the Statute and thus in the Court, respectively that at the Court's formation the existing 'security architecture' within the United Nations has been neglected. She further criticizes that the decision as to whether or not justice has to step back in order not to endanger the peace process should not be made, prudential and plain political as the answer needs to be, by the Prosecutor. She claims that it seems the whole issue of democratic transitions was left untouched in the Statute, although it is of substantial importance when trying to settle fundamental disputes that have led to large-scale crimes. This is specifically important in matters settled in areas where international law is only just getting started or unclear. Calling this interference with the powers of the SR pretentious, Wedgwood fears that „the wish for an independent criminal court may have come at the expense of the Council's role in peace and security, and so grave a derogation may be too profound for a five-week conference to consider with proper reflection.“³⁴³ This is particularly controverse considering that the authority held by the SC in matters of international peace is crystal clear when it comes to the GA and the ICJ: for both, it is not in their competence to act in a matter when this matter is either, for the GA, upon the Council's agenda, or, for the ICJ, when the SC has acted under Chapter VII of the Charter.³⁴⁴ However, the reproach of the ICC interfering gravely with the security politics of the UN doesn't fully sustain. The SC can refer cases to the Court as well as suspend investigations.³⁴⁵ To give it even more control over the

³⁴² Cohen, "A Court for a New America,"

³⁴³ Wedgwood, "The International Criminal Court: An American View." p. 96-98.

³⁴⁴ Ibid. p. 97.

³⁴⁵ Hafner, Boon, Rübesame and Huston, "A Response to the American View as Presented by Ruth Wedgwood." p. 113. See also: "Rome Statute of the International Criminal Court," vol. Art. 13(b), p. 11.

ICC, „would result in the Security Council exercising a dominating function rather than merely a significant one.“³⁴⁶

The SCs allegedly only very limited powers to intervene in the Court's proceedings is, along with the other flaws in the Statute, interpreted by American critics as the result of the rushed establishment of the Statutes in a five-week conference.³⁴⁷ This argument has to be countered by recalling the long history of commissions working on drafts for a possible international criminal court, especially the contribution of the PrepCom which spent over three years compounding over the interaction between the SR and the ICC.³⁴⁸ The reached compromise is recorded in the Articles 13 and 16, further in Art. 53 (2) and (3), 87(5) and (7).³⁴⁹ The PrepCom left a number of issues openly unsolved until the Conference in Rome, however, a comparable number of controversial issues had been successfully solved in the process that led to Rome. Among others, complementarity accounts for such an issue, as well as the relationship of the Court to national legal orders. For the issues that were left open the PrepCom prepared possible solutions in order to be able to accelerate the finding of a compromise in Rome.³⁵⁰

3.2.1 Third-Party Jurisdiction

In the case of a referral, the otherwise necessary conditions in order to trigger the ICC's exercise of jurisdiction are no longer required. The controversial aspect arising from this regulation is the fact that since the SC acts within Art. VII of the Charter, its decisions are binding in every state that ratified the UN Charter. Thus, the Court's jurisdiction is subordinated to the powers of the SC and hence legally enforceable under valid international law. This means that even states that didn't ratify the Statute fall under the Court's jurisdiction in cases that the SC referred to the Court.³⁵¹ The arrest warrant issued for Sudan's president al-Bashir is the result of this regulation;

³⁴⁶ Hafner, Boon, Rübesame and Huston, "A Response to the American View as Presented by Ruth Wedgwood." p. 113.

³⁴⁷ Wedgwood, "The International Criminal Court: An American View." p. 95.

³⁴⁸ Hafner, Boon, Rübesame and Huston, "A Response to the American View as Presented by Ruth Wedgwood." p. 114.

³⁴⁹ "Rome Statute of the International Criminal Court," vol. p. 11, 12, 33, 60f.

³⁵⁰ Kirsch, "Introduction." p. 1-2.

³⁵¹ Lee, "Creating an International Criminal Court - of Procedures and Compromises." p. 149.

after intensive lobbying of human rights groups and NGOs, the SC referred the situation in Darfur to the chief prosecutor.³⁵²

This is tangent to the prohibition of third-party jurisdiction. The SC could refer a situation in which neither the state of the accused, nor the state on whose territory the crime has been committed, are parties to the Treaty. Naturally, a lot of advantages for the Court arise from this regulation, for example an empowerment of the Court's possibilities in internal armed conflicts such as in Sudan.³⁵³ Essentially, it makes sense that precisely states likely to commit large-scale crimes will probably rather not sign the Statute of Rome and therefore elude international criminal prosecution.³⁵⁴ States critical of the alignment of the ICC with the SC put forth that this connection is in violation of the law of nations. Former prosecutor of the ICTY and ICTR, Louise Arbour, argues that the SC doesn't derive power from the Statute that it doesn't already obtain from the Charter.³⁵⁵ However, she also acknowledges that by referring situations to the Court and affecting third-party states, the law of treaties and thus regulations of the UN Charter and practice is disobeyed.

The reproach towards the SC of acting *ultra vires* by violating the principle of third-party jurisdiction in these premises sustains. However, by imposing its will on states in order to achieve prosecution, the SC reacts to neglect of contractual commitments that the states have made outside of the ICC. The right and duty to punish grave breaches or extradite a convicted person to another country where they will be prosecuted results from the GC and AP II.³⁵⁶ Furthermore, the Convention on Genocide, ratified by more than a hundred states by now, obliges the parties to the treaty to punish genocide.³⁵⁷ For a number of other crimes, such as hijacking, air

³⁵² Rodman, "Darfur and the Limits of Legal Deterrence." p. 529-530.

³⁵³ Lee, "Creating an International Criminal Court - of Procedures and Compromises." p. 149.

³⁵⁴ Morris, "High Crimes and Misconceptions: The Icc and Non-Party States," International Crimes, Peace, and Human Rights: The Role of the International Criminal Court, ed. Dinah Shelton (Ardsley, New York: Transnational Publishers, Inc, 2000). p. 219.

³⁵⁵ Arbour and Bergsmo, "Conspicuous Absence of Jurisdictional Overreach." p. 130. , p. 139f.

³⁵⁶ The responsibility to punish perpetrators of war crimes is codified in the four GC as well as in the AP of 1977 and the document ,Relating to the Protection of Victims of International Armed Conflicts. Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium. p. 62. See also: "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)," ed. Office of the High Commissioner for Human Rights (1977), vol. See also: Ambos, "Zur Bestrafung Von Verbrechen Im Internationalen, Nicht-Internationalen Und Internen Konflikt." p. 352. See also: Roht-Arriaza, The Pinochet Effect. Transnational Justice in the Age of Human Rights. p. 8.

³⁵⁷ Ambos, "Zur Bestrafung Von Verbrechen Im Internationalen, Nicht-Internationalen Und Internen Konflikt." p. 347.

piracy and others, the passed conventions include the obligation to prosecute or extradite an accused person.³⁵⁸ So to a certain extent it could be argued that the SC merely acts in its function to guard the maintenance of international peace and security. If this peace and security is compromised, the SC interferes, merely using the ICC as a tool it has on hand.

The third-party jurisdiction resulting from the alliance between the SC and the ICC is yet the smaller problem, especially for the USA, since it possesses the right to veto and thus to block referrals disadvantageous to it. Much more objection was raised due to the provisions in Art. 12(2) that regulate the Court's exercise of jurisdiction.

According to it, „the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute (...)

(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;

(b) The State of which the person accused of the crime is a national.“³⁵⁹

The objections to this regulation are obvious and, to a very big extent, justified: It does infringe on the Law of Treaties to bind a third-state against their will. However, given the basic aim of the ICC, by regulating its jurisdiction differently it would have completely missed the mark. The goal of an international court is obviously to create a universal jurisdiction. Jurisdiction is characterized by exercising a somewhat binding force on reluctant members of society: appearing in front of the court is not optional. The binding force that results from jurisdiction in national states is accepted and tolerated as long as it withstands certain criteria that prove its independence and fidelity to the rule of law. Given the logical fact that an international criminal court needs to be able to exercise its jurisdiction internationally, the same pattern of explanation can be applied. If the Court's jurisdiction is limited to international crimes, and further the national court primary in charge has to fail to react in order for the ICC to become authorized to do so, objections to the ICC should be clarified.³⁶⁰ On the other hand, the ICC needs to be careful not to interfere with states' possibilities to

³⁵⁸ Roht-Arriaza, *The Pinochet Effect. Transnational Justice in the Age of Human Rights*. p. 8.

³⁵⁹ "Rome Statute of the International Criminal Court," vol. Art. 12(2)(a) and (b), p. 11.

³⁶⁰ Morris, "High Crimes and Misconceptions: The Icc and Non-Party States." p. 220.

settle their disputes peacefully in order not to gamble away a principled positive attitude with a hasty pressing ahead that is interpreted as attempted intimidation.

Wedgwood further calls the alleged foundation in consent the lynchpin of the Statute of Rome. True that, the way it is, „it is not perfect, from anyone’s perspective.“³⁶¹ By building the ICC on a multilateral treaty rather than have it erected by the Security Council it should be guaranteed that member states explicitly agreed to its foundation. Third-party jurisdiction is contradictory to this. The USA worry that this gives ill-intentioned critics the chance to harm it.³⁶² Further, reasoning was based on the fact that this regulation constitutes a breach of the Vienna Convention on the Law of Treaties, whilst international treaties are generally not looked upon with as binding by the USA anyway.

The road of consent was not chosen, so the other side, because a compromise would have had to be bought over the most basic principles of fairness, going so far as to even compromise the Court in its purpose as a whole. The US proposal to include the right to veto a prosecution for all permanent members of the SC serves as a good example. The opposition to the US approach led to an attitude of „better no court at all (...) than one so fatally flawed.“³⁶³ In the end, US support couldn’t be achieved without a sellout on important values, which is why the international community in support of the ICC went on without it.³⁶⁴

3.2.2 Peacekeepers under Fire?

Considering the status of peacekeeping-missions under the jurisdiction of the ICC, much concern has been expressed. Especially American peacekeeping troops are stationed in many countries „and so clearly and even uniquely the targets of hatred and antipathy, that the court's mission of trying alleged perpetrators of genocide or war crimes could be twisted for political purposes to punish them wrongly.“³⁶⁵ Extra regulations were arranged for peacekeeping missions to prevent intentional abuse of the Court’s power to harm states actively involved in peacekeeping. Art. 8(2)(b)(iii) declares “intentionally directing attacks against personnel, installations, material,

³⁶¹ Kirsch, "Introduction." p. 8.

³⁶² Wedgwood, "The International Criminal Court: An American View." p. 100-101.

³⁶³ Neier, "An International Court That America Could Back,"

³⁶⁴ Ibid.

³⁶⁵ Knowlton and Fuller, "Europe Opposes World Court Exceptions: After War, a New Rift between U.S. And Eu,"

units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict³⁶⁶ a war crime. Furthermore, existing agreements concerning peace-keeping missions and the security regulations applicable to them are not affected by the regulations provided by the Statute. And in general, the principle of complementarity doesn't allow for the Court to take over jurisdiction if the affected state is willing to do so itself.³⁶⁷ In theory, members of peace-keeping missions of non-states Parties could be indicted in front of the ICC, but considering that peace-keeping has been regulated on national levels so far, there is no concern for this to change. Arbour furthermore argues that states are in possession of other means to prevent the arrest of their peace-keeping nationals.³⁶⁸ As mentioned above, the UK and France signed bilateral agreements with Afghanistan to protect their peacekeeping forces from prosecution through the ICC.³⁶⁹ The United States secured the immunity of its troops using Res. 1422, which goes a lot further than the measurements taken by the UK and France, as mentioned earlier in Chapter 4.2.

The problem is that this blackmailing of the USA could not be ignored. The USA is immensely pivotal in multinational peacekeeping measures. Peacekeeping at its momentary level would most certainly not be maintainable after a backdraw of the United States.³⁷⁰

3.2.3 The Problem of Enforcement – Prospective Scenarios for Cooperation

The question of enforcement of the ICC's decisions draws a disillusioning picture of the de facto possibilities that have been created through this new institution. Except when a situation is referred to the ICC by the SC, the de facto work of the Court will be difficult.³⁷¹ Nor does the Court itself have it in its power to arrest defendants on their territory, consequently neither to extradite them. The same is true for searching and putting evidence in impoundment (seize and search). Neither can the ICC

³⁶⁶ "Rome Statute of the International Criminal Court," vol. Art. 8(2)(b)(iii), p. 6.

³⁶⁷ Lee, "Creating an International Criminal Court - of Procedures and Compromises." p. 148.

³⁶⁸ Arbour and Bergsmo, "Conspicuous Absence of Jurisdictional Overreach." p. 139.

³⁶⁹ Knowlton and Fuller, "Europe Opposes World Court Exceptions: After War, a New Rift between U.S. And Eu,"

³⁷⁰ Zwanenburg, "The Statute for an International Criminal Court and the United States: Peacekeepers under Fire?." p. 126-127.

³⁷¹ Arbour and Bergsmo, "Conspicuous Absence of Jurisdictional Overreach." p. 139.

summon witnesses. In these and other respects the Court is completely dependant on cooperation.³⁷² Malicious tongues scornfully call the Court ,a giant without arms and legs who needs artificial limbs to walk and work.’³⁷³ Without an executive apparatus the ICC is totally dependent on cooperation.³⁷⁴

Cooperation in criminal affairs between states usually follows the principle of voluntariness. Apart from obligations resulting from treaties or other commitments, there is no rule of customary international law dictating compulsory cooperation. Swart lists sovereignty, equality, reciprocity, mutual interests if existent, and the necessity to protect individuals from unjust treatment by the other state as the main aspects governing cooperation between states in criminal affairs. In the case of extradition treaties there is mostly accordance in both legal orders as to whether the committed act is a crime. Cooperation between states can thus be characterized as horizontal, as opposed to the vertical cooperation between states.³⁷⁵ At least this is true in theory, since ultimately the Court has the decisive power over rights and duties arising for states-parties, a regulation that doesn't form part of intra-state law of nations.³⁷⁶ State cooperation is crucial for investigations, arrest warrants and other necessary steps in the prosecution process. The ICC imposes these duties on the states in art. 86.³⁷⁷

However, in the case of a reluctant state, the prospects are limited, as seen in the case of Sudan's President al-Bashir. If the concerned state doesn't cooperate, the international community is in demand. The recourse to aids such as political, military or economic sanctions or other methods to pressure the unwilling state must be

³⁷² Swart, "General Problems," The Rome Statute of the International Criminal Court: A Commentary, eds. Antonio Cassese, Paolo Gaeta and John R.W.D. Jones, vol. II (New York City, Oxford: Oxford University Press, 2002), p. 1589

³⁷³ Cassese, "On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law.," European Journal of International Law.9 (1998).

³⁷⁴ Kaul, "Der Internationale Strafgerichtshof - Stand Und Perspektiven." p. 95.

³⁷⁵ Swart, "General Problems." p. 1590-1591. Meißner claims that the cooperation model between the states and the ICC contains both aspects of vertical as well as horizontal cooperation models, but tends more towards the vertical model. However, states could preserve mechanisms of protection that are traditionally part of the intra-state cooperation model. Meißner, Die Zusammenarbeit Mit Dem Internationalen Strafgerichtshof Nach Dem Römischen Statut, Münchener Universitätschriften. Reihe Der Juristischen Fakultät (München: Verlag C.H. Beck, 2003). p. 275-277.

³⁷⁶ Meißner, Die Zusammenarbeit Mit Dem Internationalen Strafgerichtshof Nach Dem Römischen Statut. p. 277.

³⁷⁷ „States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.“ "Rome Statute of the International Criminal Court," vol. art. 86, p. 60. The details to cooperation are regulated in Articles 86-102.

possible for the Court. Otherwise, its hands are tied.³⁷⁸ In case of a non-cooperating party-state, decisions on further proceedings are made in the ASP or in the SC in cases referred to the ICC by the SC, respectively. Since there is no fixed code of conduct in such cases, decisions will be based on diplomatic, political and strategic considerations.³⁷⁹ States will naturally "factor their national interest into the enforcement question."³⁸⁰ Political pressure will thus be required to enforce required actions of a reluctant state.

In case of non-compliance to the duties arising from the Statute, the party-states are entitled to sue the seceded state for breach of contract in front of the ICJ. Such a lawsuit could quickly trouble the international community, especially if the concerned state refuses to acknowledge the verdict. Not only would the political costs of this endeavour be very high, it would also require the involvement of powerful states to be promising. Otherwise such a conflict on the international level could lead to an endangerment of the international peace, which would give the SC the capacity to take action based on Chapter VII of the Charter.³⁸¹ This political pressure won't constantly be available to the same extent, but subject to contemporary situations. The rule of law would require for this pressure to be exerted permanently.³⁸²

In order to make a decision on whether or not to comply with decisions of the ICC, states will weigh the costs resulting from both scenarios: sanctions depict negative costs, while the self-interest of the states to enforce international legally binding norms would constitute the motive for compliance.³⁸³ This is even true in realist theoretical thinking, since a strong international legal system can be an option for less powerful states to ensure their standing. Constructivist thinking claims that „law is most persuasive when it is created through processes of mutual construction by a wide range of participants in a legal system,“ certain standards are adapted and only

³⁷⁸ Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden. p. 216.

³⁷⁹ "Rome Statute of the International Criminal Court," vol. p. 87(7); Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law. p. 161.

³⁸⁰ Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law. p. 161.

³⁸¹ Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden. p. 220f.

³⁸² Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law. p. 162.

³⁸³ Beach adopts this model to analyse compliance between European Union member-states and the ECJ. He suggests that for this court considerations go significantly deeper, given the fact that European law invades national legal orders to a much bigger extent. Beach, "Why Governments Comply: An Integrative Compliance Model That Bridges the Gap between Instrumental and Normative Models of Compliance," Journal of European Public Policy 12:1 (2005). p. 114.

reluctantly given up after that. In case of non-compliance, punishment for misconduct enjoys far back reaching historical legitimacy in most cultures. The approval rate of the ICC so far indicates a similarly good outlook for it to become an integrative force for legal norms: cultural structures that enjoy legitimacy have the biggest chance at being fundamentally internalized.³⁸⁴

The ICC can act as a promotor of accountability. If accountability is introduced into the international relations, political pressure can easier be regularized. Some reluctant states will, nevertheless, not be persuaded to cooperate. Many cases might require the use of force, often disguised as peacekeeping operations. Broomhall regards it as very likely that international actions, such as in Former Yugoslavia, will precede international criminal jurisdiction. The SC being the executive authority in the international system, as far as such an authority exists, is most likely to remain the origin for enforcement in cases with reluctant states.³⁸⁵

Through acts like the definition and codification of core crimes and the establishment of general principles, the Statute of the ICC will promote the rule of law in ICL. But solely through the Statute an enhancement of the possibilities of enforcement-measures cannot be detected. „Rather, the promotion of regular and effective compliance will depend on the concerted political will of the members of the Assembly of states parties and of the Security Council. Such a concerted will – ‚a culture of legality‘ – cannot arise from the formal qualities of the Statute alone, but depends on a number of factors lying outside the Statute and in some instances outside international law itself.“³⁸⁶

The principle of conditionality could prove suitable to achieve cooperation of unwilling states: it provides for financial aid and other means of support from the international community to be handed out only to states that cooperate. Nitsche suggests the inclusion of a package of measures designed to regulate the steps to be taken against a non-cooperative but contractually obligated state. It should dictate the adoption of measures according to the UN Charter, with the highest level being the submittal of the situation to the SC. According to Art. 87(6), the ICC is also entitled to request support from international organisations, hence also the UN itself, even if the

³⁸⁴ Wendt, Social Theory of International Politics. p. 300-312.

³⁸⁵ Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law. p. 162.

³⁸⁶ *Ibid.* p. 162.

case had not been referred by the SC. This could include support through UN Peacekeeping-Missions for arrests, investigations and the taking of evidence on site. Nitsche believes that out of moral obligation the UN could not reject such a proposal.³⁸⁷

It is admitted by many scholars that the problem of enforcement has been given too little thought or discussion. „The problem of enforcing the ICC's orders on the ground draws the circle back to the Security Council.“³⁸⁸ The ICC is not in the position to employ the use of force to make a state cooperate, this authority is safeguarded within the competence of the SC. This argument is taken up by the USA in order to underline its call for a stronger position of the SC. Wedgwood calls upon the hesitation to weave in the SC into the executive architecture of the Court to make its decisions heard and executed. „All-or-nothing packages will predictably make it harder to gain ratification in countries that would like nothing better than to be the treaty regime's strongest supporter.“³⁸⁹ This point is also stressed by other American critics, assuming an extraordinary role for the US in the international sphere which should serve as reason enough to exempt it from international laws applicable to any other state. Apparently, the international community didn't go for this compromise, which would have been contrary to its fundamental purpose and the thought of providing a framework of rules that applies similarly to all states, which constitutes the sheer function of law. The ICC would definitely be much stronger had it been erected in an American fashion, but it would have been downgraded to a tool that, by no means, can be dedicated to bringing justice.

3.2.4 The Crime of Aggression

To come back to Berman's concept of the three pillars of the ICC, the hidden pillar, according to Berman, constitutes the crime of aggression.³⁹⁰ Unlike the other crimes, the crime of aggression necessarily suggests the involvement of a state. While for the other crimes, state participation is possible and was a fact in Former Yugoslavia, Rwanda and cases that are currently in front of the ICC, the crime of aggression by definition involves active criminal behaviour of a state. The politicization of this issue

³⁸⁷ Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden. p. 216f, 221.

³⁸⁸ Wedgwood, "The International Criminal Court: An American View." p. 106.

³⁸⁹ Ibid. p. 107.

³⁹⁰ Berman, "The Relationship between the International Criminal Court and the Security Council." p. 178.

was thus sweeping.³⁹¹ Considering the fact that an unequivocal definition is hard to settle on in this case, states' fear of it becoming a political weapon was high.³⁹²

In order to assign individual criminal responsibility to the crime of aggression, two factors have to be preexisting: „an illegal use of force, an illegal armed attack by one State against another“, and, „an individual who is in a position of control and leadership in the attacking State whose action or conduct was, at least in part, a cause for the attack in question to take place.“³⁹³

A group called the Non-Aligned Movement supported, amongst other issues, the cause of the inclusion of the crime of aggression.³⁹⁴ The fact that no consensus could be reached on the definition of the crime of aggression constitutes a major letdown amidst the praise the Court has raised.³⁹⁵ It was still included in the Statute due to „the widespread demand for some acknowledgement of the importance of this crime, despite the inability of delegations to develop a generally acceptable definition and relationship with the Security Council.“³⁹⁶ Due to the fact that amendments to the Statute may only be made seven years after 60 nations have ratified it, thus after it entered into force, progress on the problem of aggression may take some time.³⁹⁷ Art. 5, regulating the crimes within the jurisdiction of the ICC, states that „the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the

³⁹¹ Wilmshurst, "Definition of the Crime of Aggression: State Responsibility or Individual Criminal Responsibility?," The International Criminal Court and the Crime of Aggression, eds. Mauro Poli and Giuseppe Nesi (Aldershot: Ashgate Publishing Limited, 2004). p. 93.

³⁹² Nanda, "The Establishment of a Permanent International Criminal Court: Challenges Ahead." p. 419.

³⁹³ Kaul, "The Crime of Aggression: Definitional Options for the Way Forward," The International Criminal Court and the Crime of Aggression, eds. Mauro Poli and Giuseppe Nesi (Aldershot: Ashgate Publishing Limited, 2004). p. 98.

³⁹⁴ Kirsch, "Introduction." p. 3.

³⁹⁵ Ferencz, "The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century." p. 362.

³⁹⁶ Kirsch, "Introduction." p. 4.

³⁹⁷ "Rome Statute of the International Criminal Court," vol. Art. 121(1), p. 79. See also: Ferencz, "The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century." p. 362. See also: Kirsch, "Introduction." p. 7; Yáñez-Barnuevo, "The Exercise of the International Criminal Court's Jurisdiction over the Crime of Aggression: Short Term and Long Term Prospects," The International Criminal Court and the Crime of Aggression, eds. Mauro Poli and Giuseppe Nesi (Aldershot: Ashgate Publishing Limited, 2004). p. 109.

United Nations.³⁹⁸ The problem of the difficult definition of the crime of aggression might have been solvable had there been more time in Rome.³⁹⁹

3.3 The USA and the ICC – an Outlook

In the debate on the ICC, the absence of American support has been the focus of attention. Negotiations on the ICC have taken place with three US administrations, the most recent being the least promising. A heated debate in the international community arose and drove a wedge between the EU and the US that is over to the present administration to fix. The lacking will of the world's current only superpower and the country linked most as advocate of western values moots a series of problems. The new administration under President Barack Obama has been expected with high hopes for a new direction in international cooperation and a significant improvement of US-EU relations. Up until May 2009, however, Obama has been even more cautious in directions of the ICC and US contribution to it after making more direct and semi-assuring statements during the election process, where he commented on the ICC's actions in Darfur by saying: „These actions are a credit to the cause of justice and deserve full American support and cooperation.“⁴⁰⁰ Adding that „the United States should cooperate with the ICC investigation in a way that reflects American sovereignty and promotes our national security interests.“⁴⁰¹ In what way he intends to realize this kind of cooperation is yet unknown. His former advisor Samantha Power commented on the issue by saying that until after the closure of Guantanamo, the end of the war in Iraq, and the renouncement of torture, an American membership in the ICC would be counterproductive for the Court's credibility. According to Power, it would consolidate the Court's reputation as an instrument for America's hegemony and further burden the new president's relationship to the US military. In any scenario, Obama indicated he would thoroughly

³⁹⁸ "Rome Statute of the International Criminal Court," vol. Art. 5, p. 3.

³⁹⁹ Ferencz, "The Evolution of International Criminal Law: A Bird's-Eye View of the Past Century." p. 362.

⁴⁰⁰ Rovenger, *Analysis: Obama Vs. McCain on the Icc*, June 30, 2008, http://www.globalsolutions.org/in_the_news/analysis_obama_vs_mccain_icc.

It has to be noted that immediately after the SC referral of the situation in Sudan, the US did not approve of the chosen path. Rather, they suggested an African court or the ICTR. The US abstained from voting on the issue in the SC in exchange for exempting all nationals of non-party states involved in UN or AU operations in the region. Rodman, "Darfur and the Limits of Legal Deterrence." p. 545-546.

⁴⁰¹ Rovenger, *Analysis: Obama Vs. McCain on the Icc*.

discuss any decision on ICC ratification with the US military.⁴⁰² Vice-president Joe Biden is strongly in favour of US membership in the ICC.⁴⁰³ US support for the prosecution of Sudan's president al-Bashir remains unaltered. In any case, in order for the USA to ratify the Statute of Rome it would have to pass debate in congress, which looks set to become difficult.⁴⁰⁴ Meanwhile, countries who refused to sign a BIA with the US have started to look for alternative powers to support them with military aid. „The American idea, grounded in legal principles, has been undermined“, and further, „Washington has broken ranks with the Western liberal tradition of which it should be a cornerstone.“⁴⁰⁵ The politics of double standards that the US is applying is obvious and very unlikely to survive for long.

Mutual policies will be necessary and will yet increase in importance in most globally overlapping fields of politics and economics. A hegemonic power can be one guarantor for a system of mutual interests and benefits, but so can an international regime. In the words of Keohane, „by establishing legitimate standards of behaviour for states to follow and by providing ways to monitor compliance, they create the basis for decentralized enforcement founded on the principle of reciprocity.“⁴⁰⁶ Keeping one's flexibility regarding one's position in the international community might be an outdated strategy, regarding the possible „substantial hidden costs“ that this model of choice could bear.⁴⁰⁷ Even in its position as superpower, the experience of the past years have shown that American resources have been overstrained by two simultaneous wars. The solo run bore the advantage of independence, but a rethinking of foreign politics strategies has been announced and indicated.

4 (Re-)Establishment of Peace through International Criminal Jurisdiction

As laid out in chapters 2 and 3 the international criminal court is above all of immensely symbolic value and will require time to prove itself an acknowledged and

⁴⁰² Fund, Barack Obama, <http://www.americanprogressaction.org/events/2008/hr/obama.html>.

⁴⁰³ Rovenger, Analysis: Obama Vs. McCain on the lcc. Presidential candidate John McCain was in favour of the ICC: Though he criticized the safeguard mechanisms, his position on the ICC was more positive than Obamas. He further voted against the ASPA.

⁴⁰⁴ Cohen, "A Court for a New America,"

⁴⁰⁵ Ibid.

⁴⁰⁶ Keohane, After Hegemony. Cooperation and Discord in the World Political Economy. p. 245.

⁴⁰⁷ Ibid. p. 243.

functioning institution. Not intending to undermine the success its mere establishment means to the international community, the following chapter is dedicated to evaluating the de facto effects arising from it in terms of the establishment of peace. Due to the moral implications in the concept of international criminal justice, it is difficult to assess it in a manner in which other international institutions can be assessed regarding to their success. Hence, the goals stated by the SC and expressed in the preamble of the Statute of Rome shall serve as guidelines: „deterrence, justice and peace – halting future and redressing past violations of international humanitarian law and breaking the circle of ethnic violence and retribution (...).“⁴⁰⁸

In the context of a grave breach of human rights that raises the attention of the international community, peace has been razed. Hence, to conclude logically, any attempt to reinstall peace in this situation needs to rectify this wrong that lies in the past. Criminal law is as such oriented towards the past: at the earliest while crimes are being committed, it can engage in its activity to settle the conflict. As such, it only deals with the violation of laws. The only matter in question is legally deviant behaviour, which it tries to clear out. In other words, it strives to neutralize the past events and hopes to thereby affect the present and future.

When demasking the structure of a situation that involves grave breaches of human rights, a structure of vertically adjacent layers is exposed. Of these layers, the bottommost contains the source of conflict. In order to attain this causal sub-conflict, the overlying conflict-schemes have to be dismantled. These overlying, visible conflicts constitute the subject-matter of international criminal jurisdiction. By dissolving the effects, the cause is disclosed and accessible for joint conflict resolution. The split that the large-scale has generated can be resolved by the international organ, the problems rooted underneath it will persist. Solving the obvious conflict is the fundamental condition for further endeavours and peace efforts. The causal conflict is not accessible to international jurisdiction, its resolving does not constitute its assignment, since the complex and deep-rooted reasons demand political solutions. Kant refers to certain actions during warfare that can block the later establishment of peace. Speaking in the words of Kant, thus, an international criminal court has the task of neutralizing and, strictly technically

⁴⁰⁸ Mafwenga, "The Contribution of the International Criminal Tribunal for Rwanda to Reconciliation in Rwanda." p. 17.

speaking, undoing these crimes, in order to ensure that they don't endanger peace in the future.⁴⁰⁹

International jurisdiction undertakes the groundwork to then leave the resolution of the underlying conflict to the community itself. What international criminal law is not capable of doing is to draw up guidelines for future handling of the common base the opposing parties share. Hence, criminal jurisdiction contributes to the establishment of negative structural peace. It cannot create positive peace, but lays the groundwork for its possible future formation. This common misconception has led to disappointment among spectators of the ICTY and ICTR. The main merit of international criminal jurisdiction does not lie in the prevention of large-scale crimes in the first place, but in the re-establishment of peace following these crimes. In other words, it constitutes a means to an end.⁴¹⁰ Even optimistic scholars admit that the expectation for international criminal jurisdiction to deter future large-scale crimes from happening is utopian, since its realistic possibilities are utterly limited. However, in order to justify prosecution, it is nevertheless substantiated as having certain merits: deterrence is one of them. The extent to which deterrence is a hoped-for by-effect serving also as legitimization for the procedure as a whole will be discussed in chapter 5.1.1.1.

4.1 Mechanisms of Action Arising from Peacemaking and Peacebuilding Processes

As previously discussed in Chapter 2.2, peace is a broad term. Its effects embrace various aspects in a community, therefore to measure its impact is a task exceeding the possibilities given within the scope addressed in this thesis. On a theoretical basis, to which this thesis will mainly stick, there are four categories to measure the mechanisms of action arising from peacebuilding efforts through international jurisdiction. Individualization replaces collectivization, both regarding the perpetrators as well as the victims. This is closely linked with the rehabilitation of the victims, that provides accounting for the past as a means to prevent the events from producing collectivized myths on both sides. Breaking the cycle of vengeance and retaliation constitutes the third mechanism along with the positive influence to create a culture

⁴⁰⁹ Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden. p. 65-66.

⁴¹⁰ Ibid. p. 64-66.

of conflict solving.⁴¹¹ The fourth means in which international criminal justice can effect the peace process is by standardizing ways of conflict solving.⁴¹²

Due to the relatively young age of the ICC, it doesn't seem sensible to try and predict what it might or will be able to do. Therefore, the practice used most often in the literature will be followed by drawing from the *ad hoc* tribunals as most recent embodiments of international criminal law in order to make assumptions on the effects the ICC can produce.⁴¹³ Even more so because „a sustainable ICC cannot avoid learning from history.“⁴¹⁴ Experience drawn from the ICTs has revealed the same questions that have been put forward regarding the ICC.

4.1.1 Individualization of Delinquency

Large-scale crimes often occur in the context of ethnic, political, religious or racial motivation. Both sides are seen as collective entities in which the individual loses its status and its significance. Against the backdrop of hatred focused on collectives, the feelings of pain, suffering and repayment too are being embraced by the collective entity, while projecting guilt onto the other collective. The opposed group is seen to be the embodiment of evil, especially in large-scale crimes that produced horrible atrocities. Moreover, the often unclear and confusing circumstances and a tremendously high number of victims render the situation not even remotely comprehensible. As a result, the perception shifts entirely away from individuals: the individual person becomes anonymous and recedes on behalf of the group. A collective consciousness is stressed or even only then first developed and both groups strongly delimitate themselves from one another up to complete isolation.⁴¹⁵

Reconciliation under such circumstances is very difficult. If it is not accomplished, the cycle of retribution is very likely to continue. To prevent this, guilt has to be individualized. By prosecuting the major war criminals as well as naming the victims, the collectivization is inhibited. The notion of the alleged culprit people is replaced by the designation of the perpetrators. Individuals are blamed and the guilt of the

⁴¹¹ Ibid. p. 168.

⁴¹² These categories were created by Nitsche and used in „Der ICC und der Frieden.“

⁴¹³ Schneider uses this technique in Internationale Gerichtsbarkeit als Instrument friedlicher Streitbeilegung.

⁴¹⁴ Mafwenga, "The Contribution of the International Criminal Tribunal for Rwanda to Reconciliation in Rwanda." p. 15.

⁴¹⁵ Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden. p. 168f. See also: Farer, "Restraining the Barbarians: Can International Criminal Law Help?." p. 91f.

collective is lifted. And yet through individualization the suffering of another group can be acknowledged, as well as culpability of the own collective accepted.⁴¹⁶ This is specifically important for the members of the collective that has been blamed: The truth can lift the weight of these charges off their shoulders.⁴¹⁷ Individualizing the culpable individuals prevents the emergence of an attitude of ‚now more than ever‘ among the foremost guilty collective.

Again, the principle of a layered conflict scheme can be applied: By solving the crimes that constitute the sub-conflicts, the basic conflict is made accessible. The persisting of these crimes would hamper the solution of the root of the pivotal problem. In the end, what has to be solved is the underlying problem that causes conflicts to erupt. Through international criminal jurisdiction, this first step can be achieved.

Nitsche names a striking example for a failure in creating this shift on the Balkans. Resentments among Croats and Serbs had persisted since before World War II. When they erupted again during the Yugoslav War, body counts were used to legitimate the killings: Members of the Croatian Ustaša had killed 700.000 Serbs in World War II, whereas the Tschetniks had ‚only‘ left 200.000 Croats dead. Hence, the Serbs asserted the claim to legitimately kill the remaining difference of 500.000 during the Yugoslav War in 1991.⁴¹⁸

4.1.1.1 Deterrence

The effects aspired through criminal law in the domestic sphere and on the international level are quite the same: the protection of society of deviant criminal behaviour, deterrence of possible further criminal behaviour, reinforcement of laws and the acknowledgement of the victims.⁴¹⁹ Punishment through law is thus legitimated in a three-fold way: Since the right to live and to preserve one's physical integrity constitutes a plain human right, its breach has to be punished. This breach has to be followed with a disadvantage for the perpetrator which needs to outweigh the advantage he created for himself by committing the crime. This way it can be

⁴¹⁶ Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden. p. 172.

⁴¹⁷ Tolmein, "Strafrecht Als Instrument Zur Schaffung Von Frieden: Das Beispiel Des Icty." p. 510.

⁴¹⁸ Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden. p. 170f.

⁴¹⁹ Farer, "Restraining the Barbarians: Can International Criminal Law Help?." p. 91.

assured that the criminal behaviour wasn't worthwhile. These two arguments are based on prevention. In order to ensure that the individual doesn't become a purpose for the collective, the third argument constitutes retaliation.⁴²⁰ Others categorize the intentions of criminal prosecution into deterrence, retribution, incapacitation, and rehabilitation.⁴²¹ The primary purpose according to Triffterer is to prevent crimes from happening, in the second instance the goal is also to punish and repress.⁴²²

During the trials that took place at the ICTY, a heated debate arose around the plea made by Drazen Erdemovic⁴²³, accused of committing mass murder in Srebrenica. He plead guilty acting out of necessity, claiming he himself would have been killed if he had refused to obey the command.⁴²⁴ One of the major goals of international criminal jurisdiction is to fulfill a pre-emptive impression. By trying the culprits of grave breaches, potential perpetrators are to be deterred. If the accused is acquitted or not tried at all, this signal is not being sent. Especially in the context of crimes against humanity, the pressure on the individual to stick to certain norms is very small, which explains the atrocities that are committed. International criminal law does not deal with typical criminal careers – rather real careers in criminal systems.⁴²⁵ In highly conflictive regions, public order is no longer intact, in most cases not in the least. It can be argued that the committed crimes are such that „were committed collectively by a larger group of persons as a part of social conflicts and processes in society.“⁴²⁶ This ‚differentiation between Micro- and Macro-Criminality‘, as Triffterer puts it, is essential for the dilemma that arises: By accepting the plea guilty out of necessity and acquitting the defendant, the chain of responsibility would break loose, impunity would be transferred down the chain of command leaving literally only the heads of the operation. If convicting a single soldier, other problems arise. How far do the options of a single individual reach in altering the events of a war? Only so much can be expected from the individual. By convicting a small number of rather simple soldiers, international criminal jurisdiction puts severe

⁴²⁰ Höffe, *Gerechtigkeit. Eine Philosophische Einführung*. p. 82-83.

⁴²¹ Morris, "Complementarity and Its Discontents: States, Victims, and the International Criminal Court." p. 179.

⁴²² Triffterer, "The Preventive and the Repressive Function of the International Criminal Court." p. 137.

⁴²³ Drazen Erdemovic fought in the Bosnian War in the Serbian Army. He was sentenced to 10 years in prison for genocide and participation in mass murder. His sentence was later reduced to five years.

⁴²⁴ Tolmein, "Strafrecht Als Instrument Zur Schaffung Von Frieden: Das Beispiel Des Icty." p. 501-502.

⁴²⁵ Reese, "Fünf Offene Fragen Zum Internationalen Strafgerichtshof - Und Der Versuch Einer Antwort." p. 76.

⁴²⁶ Triffterer, "The Preventive and the Repressive Function of the International Criminal Court." p. 147.

demands on the individual, leaving aside their actual options. This would mean making heroic demands on simple individuals in order to establish an unfulfillable norm. It is to be doubted whether trust in human rights standards can be created effectively by doing so.⁴²⁷

The individualization of guilt implicates the individualization of responsibility. As important as it is to avenge crimes, it still leaves a bitter aftertaste to perceive the source for the systematic deviant behaviour that led to them as the sum of misconduct of individuals, even more so if the affected individuals are plain recipients of orders.⁴²⁸ Large-scale crimes involve by definition a high number of actors in a complex system of intertwining causes and effects, producing collectively committed crimes out of political motivation. The sheer possibility of their happening can be derived from this exceptional situation inclined to criminality. The dynamics generated produce an environment in which the criminal behaviour constitutes the normal behaviour.⁴²⁹ Even by convicting the individuals, the injustice is neither undone, nor can it be adequately atoned. There is a real possibility of producing even more injustice while trying to bring justice. While not only failing to promote the peace process, such a conviction can entirely disrupt it. For the greater good of deterrence, the individual is instrumentalized or even exploited, considering that severe penalties are enacted.⁴³⁰ If the general prevention of similar crimes is aspired by these means, it should be ensured that these measures are the key to success and that a benefit for society as a whole is achieved. The individualization of guilt that is being performed in scenarios of this kind is only justified, if a deterring effect can be expected. Otherwise it would arbitrarily infringe on the rights of the individual, sans the attainment of a greater goal.⁴³¹

The criterion of deterrence seems sensible regarding to its stabilizing effect on the trust in international norms. It is furthermore consistent with the peace-keeping duty that international criminal jurisdiction has. Although trust in international norms alone

⁴²⁷ Tolmein, "Strafrecht Als Instrument Zur Schaffung Von Frieden: Das Beispiel Des Icty." p. 508.

⁴²⁸ Ibid. p. 508f.

⁴²⁹ Reese, "Fünf Offene Fragen Zum Internationalen Strafgerichtshof - Und Der Versuch Einer Antwort." p. 74-83.

⁴³⁰ Tolmein, "Strafrecht Als Instrument Zur Schaffung Von Frieden: Das Beispiel Des Icty." p. 506, 508f.

⁴³¹ Ibid. p. 506; Triffterer, "The Preventive and the Repressive Function of the International Criminal Court." p. 141.

will not bring about peace, it nevertheless creates a positive groundwork for it.⁴³² Notwithstanding, it seems hard to imagine how a sentence imposed on a single perpetrator is supposed to be a deterrent, especially since the trials mostly take place years after the crimes were committed. At the utmost, this can be expected to be successful if further fighting is feared.⁴³³

Regarding deterrence on the international level, critics further hold against that international criminal jurisdiction is so selective that a deterring effect is impossible to be produced. Prosecution for all large-scale crimes will not be possible, not even for a permanent court. The Court's approach will be selective and future criminals will gamble with this selectivity.⁴³⁴ And further, even in the national arena, deterrence can hardly be proven⁴³⁵ and is considered to be utterly limited in its possibilities.⁴³⁶

Any deterring effect, naturally, has to be preceded by a halt of the human rights violations, which is mostly accomplished through military or political interference. Putting an end to ongoing crimes cannot, for lack of executive power, be the task of a judiciary organ, but its mere existence can definitely contribute to a fast termination. Without a de facto stop of criminal events, achieving deterrence is illusory. In fact, the imperative condition of ending the ongoing violence first – before attempting to deter future acts of violence – poses a much bigger challenge.⁴³⁷ In Darfur, the rationale of the Court's possibility to deter violence against civilians was used by the SC who referred the situation to the ICC. Such an effect can, however, not be detected.⁴³⁸ Solely through its mere existence a tribunal can obviously not deter criminal activity.

In former Yugoslavia, the Kosovo Liberation Army as well as the forced displacement of Kosovo-Albanians by Serbian military took place deliberately, knowing of the regulations and processes of the ICTY. Even the NATO executed its attacks without consideration to international criminal regulations.⁴³⁹ The ICTs were appointed with

⁴³² Tolmein, "Strafrecht Als Instrument Zur Schaffung Von Frieden: Das Beispiel Des Icty." p. 507.

⁴³³ Ibid. p. 507-506. See also: Rodman, "Darfur and the Limits of Legal Deterrence." p. 531.

⁴³⁴ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium, p. 73.

⁴³⁵ Ibid. p. 73f. See also: Tolmein, "Strafrecht Als Instrument Zur Schaffung Von Frieden: Das Beispiel Des Icty." p. 506.

⁴³⁶ Gallón, "The International Criminal Court and the Challenge of Deterrence." p. 97.

⁴³⁷ Ibid. p. 96.

⁴³⁸ Rodman, "Darfur and the Limits of Legal Deterrence." p. 530.

⁴³⁹ Tolmein, "Strafrecht Als Instrument Zur Schaffung Von Frieden: Das Beispiel Des Icty." p. 512, 507.

less than what they would have required in order to fulfill their purpose properly and satisfactory, both in respect of material resources as well as executive endorsement and support. This has to be borne in mind when judging their accomplishments that stay significantly below the possible optimum regarding redress and deterrence.⁴⁴⁰

However, this ostensibly negative outlook for the deterring effect of prosecution on the international level doesn't downgrade the Court's effectivity as a whole, nor its possible future deterring capacity. Rather, this signifies that efforts to bolster its possibilities must be further intensified. Essentially, the deterring effect depends on the consistent pursuance of the principle of accountability. Both strands in collaboration can cause an abatement of the occurrence of large-scale crimes that would deliver the affirmation of the deterring effect of international criminal prosecution.⁴⁴¹ It is found among the writings of many scholars that a high possibility of criminal prosecution will have a stronger deterring effect than the prosecution of few crimes with very harsh sentences instead.⁴⁴² „Relative certainty trumps relative severity“⁴⁴³, or „deterrence is directly proportional to accountability.“⁴⁴⁴ The ICC will require time in order to live up to this goal.

The task assigned to international criminal law and national or domestic criminal law is essentially the same regarding their deterring function: It is assumed and disputed, but in both cases that doesn't lead to the redundancy of criminal law.⁴⁴⁵ The discussion of deterrence can too be put into the pattern applicable to the fundamental debate around international criminal prosecution: the chasm between redress and deterrence. Redress stresses the position of the victims and the necessity for accountability to prevail. This is viewed by critics as endangering the peace process by focusing on past events rather than placing value on a peaceful settlement and coexistence in the future. Again, this view is controversial since it bears the possibility

In this context, Gallón argues that Chile serves as an example of insufficient deterrence: given the fact that there has neither been criminal prosecution nor redress for the victims, a third of the Chilean population allegedly still supports the actions their former leader took. Gallón traces this non-existent impact of deterrence back to the lack of accountability. Gallón, "The International Criminal Court and the Challenge of Deterrence." p. 96. See also: Rodman, "Darfur and the Limits of Legal Deterrence." p. 533. As an example, the massacre of Srebrenica took place two years after the establishment of the ICTY.

⁴⁴⁰ Gallón, "The International Criminal Court and the Challenge of Deterrence." p. 95-96.

⁴⁴¹ Ibid. p. 93.

⁴⁴² Farer, "Restraining the Barbarians: Can International Criminal Law Help?." p. 92.

⁴⁴³ Ibid. p. 92.

⁴⁴⁴ Gallón, "The International Criminal Court and the Challenge of Deterrence." p. 97.

⁴⁴⁵ Triffterer, "The Preventive and the Repressive Function of the International Criminal Court." p. 173.

of sacrificing the victim's rights and the principle of accountability to the potential greater good of deterrence. „This distinction would not be problematic if the preference for one purpose was not viewed as denigrating or eliminating fulfillment of the other.“⁴⁴⁶

4.1.2 Rehabilitation of the Victims

On the level of the individual, the factors mentioned in chapter 1.1.15. lead to processing and overcoming of the experienced. The acknowledgement of anguish and woe confirms the fact that the crimes have been committed. Through this originates a forum for the victims in which their experiences are asserted on a social level before a general public paying attention. Acknowledging of the experiences of victims leads to the disposition to forgiveness. Rehabilitation of the individual can also have an effect on the collective – comparable to group therapy for the victims in their entirety. Their collective dignity is restored and equality recovered, humiliation is neutralized. The objectivization of the occurrences prevents the formation of myths and distinctive writing of history. Due to the large amount of victims after large-scale crimes this is possibly the biggest challenge to the court.

International Law as such is state-oriented. The period of the Westphalian peace in 1648 until the end of World War II has been dominated by this view. Only gradually has the individual become an acknowledged subject within it, partly springing from the development of international law after World War II: prosecution of individuals – thus accountability of individuals - suggests the need to protect individuals – hence their position is validated. Rehabilitation and reparation are mutually dependant: Achieving the granting of the victim's position, including its right to redress, is an inherent part of this appreciation of the individual.⁴⁴⁷

This approach raises certain difficulties in the context of accountability: crimes are committed by individuals, whether in a position of a state official or not, its not possible or at least not sensible to hold the state as an entity liable. By doing this, the

⁴⁴⁶ Gallón, "The International Criminal Court and the Challenge of Deterrence." p. 94.

⁴⁴⁷ Bassiouni, Introduction to International Criminal Law. p. 90-92. Bassiouni mentions the discrepancy between international human rights law and international criminal law: „It seems as if the former is a shield without a sword, and the latter a sword without a shield. The parallelism of these two bodies of law limits the reach of international criminal law to punish fundamental human rights violations, while these rights remain without effective enforcement.“ Bassiouni, Introduction to International Criminal Law. p. 92.

entire population would be criminalized, a result that - even in macro-crime scenarios – doesn't reflect the reality. For this reason, the view that prevailed provides that liability is not attributed to the state; it is, however, given the responsibility to make reparations for crimes committed, more or less, in its name.⁴⁴⁸ In the Statute of the ICC, the state is not addressed for the reparation of victims.⁴⁴⁹

The Statute provides for the Court to „make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.“⁴⁵⁰ McKay points out that „this was the first real attempt to develop a reparation regime in the context of international criminal justice and thus its content had to be built largely from first principles.“⁴⁵¹ Fear for the newly inaugurated court to be showered with claims from victims, as well as concern it would turn into a ‚social service agency‘ dominated the debate on how to properly regulate reparation within the Statute.⁴⁵² Clearly, this represents an ethical debate: the focus doesn't lie on the realization as much as on the search for a normatively adequate solution first.

The question of victim compensation is essentially a difficult one. Who is supposed to bear the costs? „Can a Tutsi government with no resources be expected to provide compensation to Tutsi citizens for violations committed by a Hutu regime?“⁴⁵³ Past experiences have shown that monetary reparations aren't essential for reconciliation – bringing out the truth, and hearing an apology, has been enough in a number of cases.⁴⁵⁴ Naturally, this is also due to the fact that the *ad hoc* tribunals only marginally handled the question of reparation, and even in the process leading up to the establishment of the ICC several drafts didn't mention it.⁴⁵⁵ However, the outlook of reparation not being absolutely necessary for a peace process is fortunate for the ICC, since satisfactory compensation for the losses of victims in a macro-crime

⁴⁴⁸ Mafwenga, "The Contribution of the International Criminal Tribunal for Rwanda to Reconciliation in Rwanda." p. 14-15.

⁴⁴⁹ Such a provision was part of the Draft Statute but didn't survive the conference in Rome. McKay, "Are Reparations Appropriately Addressed in the Icc Statute?." p. 173.

⁴⁵⁰ "Rome Statute of the International Criminal Court," vol. Art. 75(2), p. 52.

⁴⁵¹ McKay, "Are Reparations Appropriately Addressed in the Icc Statute?." p. 163f.

⁴⁵² Ibid. p. 168.

⁴⁵³ Bassiouni, Introduction to International Criminal Law. p. 105.

⁴⁵⁴ The relations between former colonialized countries and colonial powers prove this point.

Mafwenga, "The Contribution of the International Criminal Tribunal for Rwanda to Reconciliation in Rwanda." p. 15f.

⁴⁵⁵ McKay, "Are Reparations Appropriately Addressed in the Icc Statute?." p. 166-167.

scenario seems entirely unthinkable. On the other hand, however, the ICC strives for the deference of human rights of which victim's rights form an integral part. Considering the fact that the ICC aims to protect human rights it should impose its standards on the guidelines of the Court's jurisdiction.⁴⁵⁶ Bassiouni lists the unwillingness to recognize the victim's right to justice and to redress as another sign of the „schism that exists between humanitarian and humanistic values on the one hand and political realism on the other.“⁴⁵⁷ Essentially, validation of victim's rights constitutes a fundamental part of the goals ICL is aiming for, such as accountability, the rule of law, and justice: While still being far from perfect or even operative, there has still been progress on the idea of victim-orientation in ICL.⁴⁵⁸

The efficiency of this reparation regime amounts to a different question and is disputable regarding the fact that the ICC's jurisdiction is based on the pre-condition of unwillingness or inability of the national state to prosecute. Hence – it may be expected that this state is not able or willing to enforce repayments either.⁴⁵⁹ On the bright side, the ICC enjoys relative flexibility regarding reparations of victims: provided that it is granted support in order to enforce its measures, the reparation regime is certainly a positive factor in the framework of the ICC.

4.1.2.1 Amnesties

The question of amnesties was intensively debated at the conference in Rome. They constitute a political tool that has often proved necessary in order to achieve a criminal regime to step down and allow a transition process to begin. But it moots a series of important questions related to justice. „If punishment is the international community's right by virtue of the implied social contract, does it also include the right

⁴⁵⁶ Shelton, "Reparations for Victims of International Crimes," International Crimes, Peace, and Human Rights: The Role of the International Criminal Court, ed. Dinah Shelton (Ardsley, New York: Transnational Publishers, Inc, 2000). p. 137.

⁴⁵⁷ Bassiouni, Introduction to International Criminal Law. p. 28.

Progress had been made on the idea of victim's rights through the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 1985, developed by the UN Commission on Crime Prevention and Criminal Justice, and further the report of special rapporteur Theodoor van Boven together with a draft set of UN Basic Principles and Guidelines on the right to restitution, compensation and rehabilitation for victims of grave breaches of human rights and humanitarian law in 1993. Further, the approach to recompense by the Inter-American Court of Human Rights and the UN Committee against Torture reflects a concentration on the rights of the victims. McKay, "Are Reparations Appropriately Addressed in the Icc Statute?." p. 164f.

⁴⁵⁸ Bassiouni, Introduction to International Criminal Law. p. 106.

⁴⁵⁹ McKay, "Are Reparations Appropriately Addressed in the Icc Statute?." p. 164.

to pardon?"⁴⁶⁰ The right to punish used to be that of the victim, essentially. If the international community now takes over this right, the right to pardon should remain with the victim and at least not be bartered with. Bassiouni takes this argumentation to another level, saying that victim's rights are a fundamental part of the social contract which in turn is vested in legal history. Thus, for the representatives of state to abnegate these victim's rights would be an act of ultra vires, an action exceeding its power. Quite the other opposite is what a state is obliged to induce: to see that the victim's rights are assumed, whatever these rights may constitute. The exact procedure of this process is not fixed.⁴⁶¹ „(Consequently), neither de jure nor de facto impunity can be provided to the transgressors of these ius cogens international crimes."⁴⁶² According to the social contract theory victim's rights are both „inherent and inalienable."⁴⁶³ Granting impunity would thus be a violation of human rights. It would further possibly violate humanitarian law, since the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 as well as the Geneva Conventions explicitly contain the duty to punish grave breaches of human rights.⁴⁶⁴ The Geneva Conventions also provide for the prosecution of officials and the definition of genocide within it is the same as in the Statute of the ICC. Hence, according to treaty law, the granting of amnesties where prosecution would be required is not allowed. However, since the existing framework of law provides the obligation of states to prosecute, it is strictly legally speaking not clear whether the ICC has the same obligation.⁴⁶⁵ Whether international law definitely and strictly interdicts the awarding of amnesties cannot assuredly be said.⁴⁶⁶

In truth, victim's rights have been traded with political arrangements on any number of occasions. These trades are often necessary or reasoned to be necessary in order to achieve a pacification in the prevailing conflict. Granting impunity has been standard procedure in the international community, whether it be Kaiser Wilhelm or

⁴⁶⁰ Bassiouni, Introduction to International Criminal Law. p. 730.

⁴⁶¹ Ibid. p. 729-730.

⁴⁶² Ibid. p. 730.

⁴⁶³ Ibid. p. 729.

⁴⁶⁴ Hafner, Boon, Rübesame and Huston, "A Response to the American View as Presented by Ruth Wedgwood." p. 111. See also: Convention on the Prevention and Punishment of the Crime of Genocide of 1948, Art. IV.

⁴⁶⁵ Roht-Arriaza, "Amnesty and the International Criminal Court," International Crimes, Peace, and Human Rights: The Role of the International Criminal Court, ed. Dinah Shelton (Ardsley, New York: Transnational Publishers, Inc, 2000). p. 77-78.

⁴⁶⁶ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium. p. 67.

Milosevic who were granted participation in horse trades that let the victim's rights fall by the wayside.⁴⁶⁷ Amnesties have often been used by leaders as a condition for their resigning and paving the way for democratic transition. Further, newly imposed governments often don't possess the institutional power it takes to initiate criminal proceedings after periods of grave social unrest. Rwanda, for instance, didn't dispose of the jurisdictional infrastructure necessary in order to perform trials.⁴⁶⁸ Impunity can thus be granted or just occur by inability or unwillingness of a state to prosecute the crime.⁴⁶⁹ Amnesties are, however, not exactly the same as impunity: While amnesty qualifies as a „deliberate positive action“, impunity constitutes „an act of exemption (...) from punishment, or from injury or loss.“⁴⁷⁰ It can only occur after someone has been pronounced guilty – to grant it before a trial even is a pure embodiment of impunity. „Accountability is the antithesis of impunity.“⁴⁷¹ In cases where amnesties are applied, justice is definitely traded to a certain extent with the hope for a greater good.⁴⁷²

Ruth Wedgwood in ‚An American View‘ on the Court comments that she sees it as a good sign that the jurisdiction of the Court will focus on war crimes committed as part of a bigger plan, suggesting systematic policy, and not involve „the defalcations that are often committed in war.“⁴⁷³ She further points out the costs of prosecution, emphasizing that in most of the fundamental regime changes in the recent past such as in the former communist European states, it was a question of either/or. Truth Commissions might be an option in such a situation, but a real transition is very likely to be made at the price of amnesties.⁴⁷⁴ In the process leading up to the ICC, the USA put forward the suggestion that it should include the possibility of amnesties. Resistance to this proposal was big, explaining why it was not explicitly included in the Statute.⁴⁷⁵

⁴⁶⁷ Bassiouni, Introduction to International Criminal Law. p. 730-731.

⁴⁶⁸ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium. p. 56-57.

⁴⁶⁹ Bassiouni, Introduction to International Criminal Law. p. 705.

⁴⁷⁰ Ibid. p. 705.

⁴⁷¹ Ibid. p. 705.

⁴⁷² Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium. p. 56.

⁴⁷³ Wedgwood, "The International Criminal Court: An American View." p. 94.

⁴⁷⁴ Ibid. p. 95.

⁴⁷⁵ Roht-Arriaza, "Amnesty and the International Criminal Court." p. 79.

The question of amnesties was very controversially debated, emphasizing especially the importance of a smooth transition to democratic governance and the role of reconciliation commissions.⁴⁷⁶ In the end it was decided not to mention amnesties in the Statute, although Art. 53(1)C suggests nothing else when mentioning that the Prosecutor shall determine whether a prosecution will be in the best interest of justice.⁴⁷⁷ Further, Art. 17(2)(a) explicitly lists an investigation led by the attempt to shield a person from criminal prosecution as an indication of an unwilling national government, marking the point where the complementary jurisdiction of the ICC sets in.⁴⁷⁸ Explicitly including amnesties in the Statute would have pulled the rug out from under the Statute in its aim to announce impunity a phenomenon of the past.⁴⁷⁹ In the Statutes of the ICC itself the determination to „put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes“⁴⁸⁰ is pointed out. It would thus „have run counter to the basic objectives of the United Nations if respect for amnesties granted by individual states had become an obligation of the ICC.“⁴⁸¹ The UN have always stressed the fact that amnesties are unacceptable when it comes to crimes such as genocide and crimes against humanity.⁴⁸²

So amnesties could be one way to grant impunity and thus reduce international criminal justice to absurdity. „The choice is between the application of blanket amnesties and politically motivated pardons without the democratically given consent of the victims and meeting some of the victims' rights while achieving a greater social benefit.“⁴⁸³ In other words, the effect of impunity resulting from amnesties is „merely a by-product of a decision taken for the purpose of national reconciliation.“⁴⁸⁴ Amnesties given in situations where criminal guilt is on hand cannot be in the interest

⁴⁷⁶ Hafner, Boon, Rübesame and Huston, "A Response to the American View as Presented by Ruth Wedgwood." p. 109.

⁴⁷⁷ "Rome Statute of the International Criminal Court," vol. p. 33; Wedgwood, "The International Criminal Court: An American View." p. 97. See also: Roht-Arriaza, "Amnesty and the International Criminal Court." p. 77.

⁴⁷⁸ Roht-Arriaza, "Amnesty and the International Criminal Court." p. 79; "Rome Statute of the International Criminal Court," vol. Art. 17(2)(a), p. 13.

⁴⁷⁹ Hafner, Boon, Rübesame and Huston, "A Response to the American View as Presented by Ruth Wedgwood." p. 108.

⁴⁸⁰ "Rome Statute of the International Criminal Court," vol. Preamble, p. 1.

⁴⁸¹ Hafner, Boon, Rübesame and Huston, "A Response to the American View as Presented by Ruth Wedgwood." p. 111.

⁴⁸² Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium. p. 65-67.

⁴⁸³ Bassiouni, Introduction to International Criminal Law. p. 731.

⁴⁸⁴ Roht-Arriaza, "Amnesty and the International Criminal Court." p. 79.

of peace because it destroys belief in the fairness and steadfastness of law and thus of justice altogether.⁴⁸⁵ As such, it can also not be expected to produce a deterring effect on possible criminals.⁴⁸⁶ Regarding the positive effect criminal prosecution is intended to have on the peace process, amnesties can run counter to it by imposing the decision of granting amnesties to criminal leaders without the consent of the population.⁴⁸⁷

Essentially, there are two sides to the medal of accountability. One is the responsibility of the state to act in the interests of justice and peace, and, essentially, maybe having to trade one for the other. In this context, it might also not always be „in the interest of the international community to force a fledgling democracy to commit political suicide.“⁴⁸⁸ The other side represents the individual accountability of officials, which, slowly but constantly, is taken out of the hands of the state. It is therefore no longer dependent on the concerned state; whether this state may be in the position to assist the prosecution is ultimately irrelevant.⁴⁸⁹

This dilemma is perfectly illustrated in the ongoing debate about the arrest warrant issued for Sudan's president al-Bashir. Held against this measure by many is the concern that this constitutes yet another contribution to the already majorly instable situation in Sudan. With yet hundreds of thousands of people in refugee camps and heated diplomatic attempts from all sides and, above all, the UN; angering al-Bashir is perceived as an unwise step that could throw not just the peace process back by years, but produce immediate negative effects for the masses of victims. These concerns were not without cause: al-Bashir immediately ordered several NGOs and aid workers to leave – a fatal decision for the millions of people in Sudan that fully depend on them. Further, the UN peacekeeping troops are made likely targets for acts of retaliation by the Sudanese government. Already, several peacekeepers have been killed in Sudan. Moreno-Ocampo's move is specifically questionable when considering the fact that the ICC is highly unlikely to catch al-Bashir, who enjoys broad support among the government officials of many countries. What the

⁴⁸⁵ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millenium, p. 67-68. See also: Bassiouni, Introduction to International Criminal Law, p. 731.

⁴⁸⁶ Bassiouni, Introduction to International Criminal Law, p. 731.

⁴⁸⁷ Mafwenga, "The Contribution of the International Criminal Tribunal for Rwanda to Reconciliation in Rwanda." p. 17.

⁴⁸⁸ Meintjes, "Domestic Amnesties and International Accountability." p. 88-89.

⁴⁸⁹ Ibid. p. 89.

prosecutor effectively establishes by still pressing charges against him is a clear sign in direction of the international community that people of all ranks within a state will be held liable for criminal activity on a large scale.⁴⁹⁰ „The strategic studies literature indicates that coercion is likely to be successful if threats are accompanied by reassurances and if the coercer's demands do not impinge on the vital security or survival interests of the regime.“⁴⁹¹ This would mean that „who can be prosecuted will depend on whose cooperation is needed for a political settlement.“⁴⁹² Scholars assess the prosecution of high-ranked leaders as the biggest impact the tribunals in Rwanda and Yugoslavia have had. It was then that the population assigned credibility and a genuine aspiration for justice to the tribunal. Coliver explicitly points out explicitly that the issuing of an arrest warrant should not be bound to the existence or lack of political will backing it up, since precisely the political will is subject to considerations that change over time and thus, it might develop.⁴⁹³ In the case of Former Yugoslavia, many believed that pressing charges against Milošević would endanger the safe return of Kosovars, similar to the fear that indicting Mladic and Karadzic would render the Dayton peace accord impossible. Both was not the case; rather continuing to negotiate with them would have posed a threat to the peace process.⁴⁹⁴

The question of whether or not amnesties should be granted certainly cannot be answered properly on the basis of these considerations. It adds up to deciding individually as necessity arises. The current management of the question of amnesties can be recapitulated as follows: states are constrained to do all in their

⁴⁹⁰ Simons, Polgreen and Gettleman, "Arrest Is Sought of Sudan Leader in Genocide Case," Herald Tribune July 15, 2008, <http://www.nytimes.com/2008/07/15/world/africa/15sudan.html?scp=11&sq=international%20criminal%20court&st=cse> ; See also: Simons, "Hague Court Will Pursue Sudan Leader," Herald Tribune February 23, 2009, <http://www.nytimes.com/2009/02/24/world/europe/24hague.html?scp=26&sq=international%20criminal%20court&st=cse> ; See also: Simons and MacFarquhar, "Icc Issues Warrant for Sudanese President," Herald Tribune March 4, 2009, <http://www.nytimes.com/2009/03/05/world/africa/05court.html?scp=9&sq=international%20criminal%20court&st=cse>

⁴⁹¹ Rodman, "Darfur and the Limits of Legal Deterrence." p. 531.

⁴⁹² Ibid. p. 532.

⁴⁹³ Coliver, "The Contribution of the International Criminal Tribunal for the Former Yugoslavia to Reconciliation in Bosnia and Herzegovina." p. 28.

⁴⁹⁴ Rodman, "Darfur and the Limits of Legal Deterrence." p. 537.

power to rectify past breaches of human rights, but ultimately the power of decision is taken to the international level to restrain possible arbitrariness.⁴⁹⁵

4.1.2.2 The Role of the Prosecutor

Another problem woven into the architecture of the ICC is the multiplicity of overlapping interests that are supposed to be defended: The ICC will have to act on behalf of the interests of the victims of macro-crimes, the affected states, and the community of states involved. Since the interests of these groups will necessarily diverge, it will be left to the prosecutor to decide whose interest should prevail. Even in national courts, the victim's interests may be quite different from those of society.

Critics have argued that due to the many ultimately political decisions that are now left to the prosecutor to decide, a „representative and deliberative policy-making body“ should be installed within the framework of the ICC.⁴⁹⁶ The prosecuting body will be crucial to the outcome the ICC will produce.⁴⁹⁷ With respect to the principle of legality, the prosecution could be taken out of the political context: with organs compulsory having to investigate, the political implications this might have are not being considered.⁴⁹⁸ This would put justice on the upper hand. On the other hand, that might not always be the best idea, considering that jeopardizing a peace-process is a true option here. Both interests need to be balanced.⁴⁹⁹

4.1.3 Disruption of the Cycle of Retaliation (& Promotion of Conflict Culture)

As mentioned in chapter 1.1.15, by prosecuting grave breaches in macro-crime scenarios the necessary end is put to a conflict. In Rwanda as well as in Former Yugoslavia old scores were settled. The perception of having been victimized urges retaliation. If no end is put to the conflict, it erupts in cycles, since a balance in deaths

⁴⁹⁵ Meintjes, "Domestic Amnesties and International Accountability." p. 89.

⁴⁹⁶ The victims biggest concern might be retribution, while the focus of the states-parties to the ICC will probably lie on deterrence. Even in the question of who to prosecute, interests can heavily diverge: on the international level and the states community, political leaders will constitute the primary goal, while the victims might want to see the soldiers indicted that personally committed crimes. Morris, "Complementarity and Its Discontents: States, Victims, and the International Criminal Court." p. 177-179.

⁴⁹⁷ Reese, "Fünf Offene Fragen Zum Internationalen Strafgerichtshof - Und Der Versuch Einer Antwort." p. 74.

⁴⁹⁸ Hafner, Boon, Rübesame and Huston, "A Response to the American View as Presented by Ruth Wedgwood." p. 109.

⁴⁹⁹ Interesting in this context is Cambodia, as it demonstrates the strive for justice as well as peace; accounting for the past whilst not risking the peace in the future is a thin line to walk. Ibid. p. 113.

and oppression that is also perceived as such will hardly ever be achieved. In order to leave behind the impression of having conducted fair and unbiased trials, the international court in charge has to be able to conduct its work independently of strategic political considerations. However, as broadly laid out in the previous chapters, this de facto independence is not granted. Be it regarding the selection of crimes that will even be considered for international criminal jurisdiction or the possibilities of the court to work freely and independently of state cooperation, it has been laid out clearly that the ICC will too, in the tradition of its predecessors, work within a very limited scope of actual possibilities. Not surprisingly, this severely affects the standing the institution has in the local setting that it is designed to bring justice to.

In Former Yugoslavia, major war criminals remained in office. They were even the negotiating parties and contact persons of the international community.⁵⁰⁰ When investigations were running against Franjo Tudjman of Croatia, Slobodan Milošević of Serbia and Montenegro and Alija Izetbegović of Bosnia-Herzegovina, all of them were the highest representatives of their states.⁵⁰¹ The same is true for Foday Sankoh, leader of the RUF in Sierra Leone.⁵⁰² In the case of Former Yugoslavia, the international community signaled unwillingness to support charges against them and consequently no criminal prosecution was taken up.⁵⁰³ The reasons therefore lay partly in fear of destabilization of the region in case of a resurgence of the conflict. Especially short-term interests followed by the NATO member-states played an important role. It wasn't until the conflict in Kosovo escalated into war that the lawsuit against Milošević could be taken up, notabene after the NATO campaign against the FRY had been going on for 60 days. The international community held on to protecting Milošević until he conducted his criminal actions in such a bold and unapologetic manner that whitewashing him was no longer possible. Only then was the ICTY finally able to receive documents from the secret service of both the USA

⁵⁰⁰ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium. p. 69. See also: Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden. p. 217.

⁵⁰¹ Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden. p. 217.

⁵⁰² Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium. p. 69.

⁵⁰³ Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden. p. 217f.

and Great Britain that it had been trying to obtain for a long time.⁵⁰⁴ The major powers were thus not only not supportive but essentially hampering the work of the tribunal. This kind of abuse of the tribunal for political considerations left it delegitimized. Among the involved conflict parties the tribunal was perceived as an instrument of victor's justice used to control the Balkan States. As such, it can hardly act out its peace-establishing mission. On the contrary, it led to the emergence of martyrdom, revanchism and the maintenance of tensions among the region as a result of the „regrettable tendency of criminal justice to occasionally take on the appearance of retribution and revenge.“⁵⁰⁵ Former judges of the ICTY Richard Goldstone and Carla del Ponte stressed the fact that political will was scarce, and the attempts to obtain assurance by state officials endless.⁵⁰⁶

Further, it can even be said that the attempt to trade peace for justice by granting impunity to criminal leaders has failed in both Former Yugoslavia and Sierra Leone. Instead of their peaceful settling for a high price, conflicts in both countries rekindled. Milošević even moved on to committing further large-scale atrocities in Kosovo.⁵⁰⁷ On other government officials, the threat of being indicted had a moderating effect on their political orientation, forcing them to keep a low profile.⁵⁰⁸ Especially from the Serbian community the tribunal was perceived as victor's justice, but essentially this reproach was made by the Croat side too. Alija Izetbegovic, who remained in office, was considered a war criminal by many; his sparing was met with lack of understanding, especially since the war leaders of the other parties, Karadzic and Mladic, were indicted. The Bosniak party to the conflict, on the other hand, doubts that these leaders will ever be captured. Further, the fact that only few of the masterminds behind the genocide and war crimes were captured fueled dissatisfaction with the tribunal among all parties involved. The deaths of Slavko Dokmanovic, who committed suicide, and Milan Kovacevic, who suffered a fatal heart

⁵⁰⁴ Ibid. p. 218-219.

⁵⁰⁵ Triffterer, "The Preventive and the Repressive Function of the International Criminal Court." p. 141; Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden. p. 219. The emergence of martyrdom, clearly, resulted from a conglomerate of factors, one of them being the attitude of the Republika Srpska towards the indicted, for example by financially supporting the families of those detained in The Hague. Coliver, "The Contribution of the International Criminal Tribunal for the Former Yugoslavia to Reconciliation in Bosnia and Herzegovina." p. 26.

⁵⁰⁶ Rodman, "Darfur and the Limits of Legal Deterrence." p. 535.

⁵⁰⁷ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium. p. 70-71.

⁵⁰⁸ Coliver, "The Contribution of the International Criminal Tribunal for the Former Yugoslavia to Reconciliation in Bosnia and Herzegovina." p. 27.

attack, and even Slobodan Milosevic too were regarded as resulting from poor prison conditions among the Serbian community, while the Bosniaks perceived it as unjust that these major war criminals hadn't lived to see justice be brought to them.⁵⁰⁹

The lack of independent media further impeded the possibilities of the tribunal in the beginning, while the nationalist media used this advantage to exploit its monopoly. Ignorance as to the functioning of the tribunal, the number of indicted and their background contributed to the negative standing in the population.⁵¹⁰

Clearly, these examples illustrate the difficulties a tribunal faces in the ambition to establish justice. While some of the reasons that damaged the reputation of the ICTY can be linked directly to poor cooperation, they laid the foundation for criticism exploding in all directions. The experience of the ICTY perfectly demonstrates the difficult endeavour of handling a macro-crime situation to the satisfaction of all parties involved. The experience of the *ad hoc* tribunals also teaches the lesson that genuine progress in their work was only possible when political will of the major powers was given.⁵¹¹ The self-interested irregularity of the will to support and its subjectedness to other political considerations were what compromised the tribunals integrity.

4.1.4 Standardization of Conflict Solving

By administering criminal justice on the international level, the ICC can promote the consistency of the appliance of law. Nitsche speaks of the charisma that will emanate from the court and subsequently affect national legal systems. He predicts that from this an equalization regarding the treatment of grave breaches is to be expected, leading to a universalization of standardized norms. Different legal orders will assimilate their regulations according to the Court's practice, leading to a harmonization in the provisions worldwide.⁵¹² By way of example, the handling of the death penalty can account as such an aspect. The SC had excluded capital punishment as an option within the jurisdiction of the *ad hoc* tribunals. In Rome, the determination was more difficult, given that the jurisdiction of the ICC is intended to reflect all legal systems to a certain extent in order to be able to unite them under one roof. Considering the sweeping majority of states absolutely against it, the severest

⁵⁰⁹ Ibid. p. 20-22.

⁵¹⁰ Ibid. p. 23.

⁵¹¹ Rodman, "Darfur and the Limits of Legal Deterrence." p. 530-531.

⁵¹² Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden. p. 60.

penalty enactable is life imprisonment, and that too only „when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.“⁵¹³ By refusing to punish even the most heinous crimes with the death penalty, the ICC can act as a radiator, pressing ahead with the abolition of this sentence altogether. Also Broomhall refers to the effect on criminal provisions worldwide. He believes that a culture of accountability will develop through the course of international criminal jurisdiction. This anon can be used to regulate political pressure. The Statute of Rome can contribute to the strengthening of the rule of law by defining core crimes and standardizing general principles. Whether this will have a positive effect on enforcement is unclear.⁵¹⁴ But most importantly, the concept of impunity is implemented. The lack of criminal sanctions imposed against breaches of human rights on the international level will at least in some cases be opposed.⁵¹⁵

Already now, Spain, Belgium and Germany follow the principle of universal jurisdiction which implies to hold alleged perpetrators criminally liable even if the accused is not a citizen of the state and the crime has been committed in a different country. In 1998, Spanish judge Baltasar Garzón managed to have former Chilean leader Augusto Pinochet arrested in London.⁵¹⁶ In Spanish national law, these regulations go back to 1985, some even to the 1870s.⁵¹⁷ In the case of universal jurisdiction, „the connection to the prosecuting state is not made through any particular connection of the state to the criminal event, but rather to the nature of the crime itself.“⁵¹⁸ Over one hundred countries incorporate some forms of universal jurisdiction over certain crimes in their legal orders.⁵¹⁹ Spain further succeeded in practicing jurisdiction in the case covering thousands of people that have been killed

⁵¹³ "Rome Statute of the International Criminal Court," vol. art. 77(1)(b), p. 54.

The biggest opposition to the exclusion of the death penalty came from the Arab countries and the Caribbean. Schabas, "The Penalty Provisions of the Icc Statute," International Crimes, Peace, and Human Rights: The Role of the International Criminal Court, ed. Dinah Shelton (Ardsley, New York: Transnational Publisher, Inc, 2000). p. 116ff.

⁵¹⁴ Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law, p. 162.

⁵¹⁵ Reese, "Fünf Offene Fragen Zum Internationalen Strafgerichtshof - Und Der Versuch Einer Antwort." p. 80. See also Bruer-Schäfer, Der Internationale Strafgerichtshof. Die Internationale Strafgerichtsbarkeit Im Spannungsfeld Von Recht Und Politik, p. 126.

⁵¹⁶ Böhm, "Auch Staatschefs Müssen Strafe Fürchten,"

⁵¹⁷ Roht-Arriaza, The Pinochet Effect. Transnational Justice in the Age of Human Rights, p. 6-7.

⁵¹⁸ Ibid. p. 7.

⁵¹⁹ Ibid. p. 8. An indictment of Cuban president Fidel Castro was aimed at in Spain but dropped due to immunity of a head of state while in office. Further charges were tried to press at Morocco's King Hassan II and Theodora Nguema, the son of Equatorial Guinea's president, but didn't succeed. Roht-Arriaza, The Pinochet Effect. Transnational Justice in the Age of Human Rights, p. 170.

or gone missing in Guatemala's Civil War between 1978 and 1986.⁵²⁰ Other cases involved former officials of Congo, Chad, and Suriname. In the end, none of these indictments succeeded fully, neither did the Pinochet case, but they illustrate the potential of universal jurisdiction.⁵²¹ In 1999, Belgium introduced universal jurisdiction that didn't even require the presence of the indicted at trial. Officiating heads of state can also be indicted. Further, pressing charges is possible also for parties neither Belgian, nor resident in Belgium. The most prominent in this context is the case involving Ariel Sharon's indictment by a group of Lebanese-Palestinians for crimes against humanity, war crimes and genocide during the Israeli invasion of Lebanon in 1982.⁵²² In this case, it was ultimately decided that the defendant needed to be in Belgium in order to be indicted, and the proceedings were stopped. After George W. Bush, Dick Cheney, and other high-ranking US officials were indicted by Iraqis in Belgium for atrocities committed during the Gulf War in 1991, pressure on Belgium was tuned up. Ultimately, the law was modified in order to make it more difficult to draw on it in cases that don't concern Belgium according to traditional national criminal law.⁵²³

The standardization of conflict solving also implies the building of a memory for large-scale crimes: Courts and tribunals fulfill the purpose of a record of history for generations to come. This is essential in order to guarantee that history is not forgotten and thus not repeated but preserved as a monument to the crimes and the victims they produced.⁵²⁴ By establishing a tribunal an archive is built: the crime is preserved, future generations will remember it.⁵²⁵ The threat of „historical amnesia“ is thus warded off, as former ICTY president Antonio Cassese puts it.⁵²⁶

⁵²⁰ Menchu, "Spain May Judge Guatemala Abuses," BBC News (October 5, 2005), vol.

⁵²¹ Roht-Arriaza, The Pinochet Effect. Transnational Justice in the Age of Human Rights, p. 170.

⁵²² The particular charges were aimed at the committal of these crimes in refugee camps through Lebanese militias that the Israeli forces did not avert. Ibid. p. 189.

⁵²³ Ibid. p. 190.

⁵²⁴ Cassese, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court." p. 6. See also: Sewall, Kaysen and Scharf, "The United States and the International Criminal Court: An Overview." p. 2.

⁵²⁵ Cassese, "From Nuremberg to Rome: International Military Tribunals to the International Criminal Court." p. 6.

⁵²⁶ Antonio Cassese is quoted in: Coliver, "The Contribution of the International Criminal Tribunal for the Former Yugoslavia to Reconciliation in Bosnia and Herzegovina." p. 28.

4.2 Truth Commissions – A Feasible Alternative?

As laid out in the previous chapters, criminal prosecution as a tool for establishing peace is disputable. The possibility of alternative ways of accounting for committed crimes exists; its embodiment will depend on the nature of the breach and other factors inherent to the specific situation.⁵²⁷ The Rome Statute of the ICC doesn't object to the establishment of truth commissions. Truth commissions and criminal prosecution are often seen as mutually exclusive, when in fact, their concerns differ greatly. Establishing the truth only marginally deals with the question whether anyone will be prosecuted for the crimes that come into the open during the work of the commission. Truth commissions as such don't contradict possible criminal prosecution, instead, they can carve the way for criminal proceedings by introducing measures such as reparations for and restitutions to the victims.⁵²⁸ Further, they don't have the same implications as amnesties. „If the goal of truth commissions is remembrance, the purpose of amnesties is oblivion.“⁵²⁹ The following four points can be made about truth commissions:

- “(1) they focus on past events;
- (2) they attempt to discern the overall picture of a conflict as opposed to a given event;
- (3) they exist for a finite period of time, generally ceasing with the publication of a report; and
- (4) they generally have some form of authority emanating from either an international or national mandate.”⁵³⁰

Truth commissions have been adapted in Argentina, Bolivia, Chad, Chile, El Salvador, Ethiopia, South Africa, Uganda, Uruguay and Zimbabwe.⁵³¹ They are generally said to have positively influenced the situation in which they were implemented. Truth commissions stress the position of the victims rather than

⁵²⁷ Bassiouni, Introduction to International Criminal Law. p. 730.

⁵²⁸ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium. p. 53-54. See also: Mafwenga, "The Contribution of the International Criminal Tribunal for Rwanda to Reconciliation in Rwanda." p. 17.

⁵²⁹ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium. p. 55.

⁵³⁰ Bassiouni, Introduction to International Criminal Law. p. 711.

⁵³¹ Ibid. p. 711.

anything else and emanate a kind of 'restorative justice'.⁵³² For the victims, truth commissions are more likely to lead to overcoming of the past, since the perpetrators are more inclined to confess.⁵³³ The possible unfairness and polarization resulting from prosecutions is one aspect held against them and in favour of truth commissions. Other reasoning is of financial nature, suggesting that truth commissions are cheaper.⁵³⁴ While this is true, they can be abused for whitewashing, image-amelioration and distortion of the truth, as has happened in Uganda in 1974 and in Chad in 1990.⁵³⁵ The prosecutor of the ICTY opposed to truth commissions in virtue of fear that they would constitute an easy alternative and deliver an excuse for non-cooperating governments that see their duty to address the past crimes as done by working with truth commissions.⁵³⁶

Alternatives to prosecution should consequently only be an option if they themselves constitute a kind of punishment, in order to avoid the effect of impunity.⁵³⁷ One approach is to say that criminal prosecution should be used to deal with the leaders of grave crimes, whilst the crimes of less involved culprits could be met with conditional amnesties and / or truth commissions.⁵³⁸

⁵³² Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium. p. 53-54.

⁵³³ Reese, "Fünf Offene Fragen Zum Internationalen Strafgerichtshof - Und Der Versuch Einer Antwort." p. 79.

⁵³⁴ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium. p. 73.

⁵³⁵ Ibid. p. 54-55.

⁵³⁶ Coliver, "The Contribution of the International Criminal Tribunal for the Former Yugoslavia to Reconciliation in Bosnia and Herzegovina." p. 31.

⁵³⁷ Bassiouni, Introduction to International Criminal Law. p. 730.

⁵³⁸ Sadat, The International Criminal Court and the Transformation of International Law: Justice for the New Millennium. p. 69.

5 Conclusion and Outlook

5.1 Conclusion

In order to assess the possible effects the ICC can have through its work, the predeceasing tribunals have been analyzed. Compared to its predecessors, the ICC is weak. The ICTY, enjoying far better prerequisites, failed helplessly in many ways, which doesn't leave much hope for the ICC and at the same time makes the fragility of these instruments painfully clear.⁵³⁹ However, in retrospective the ICTs have been judged quite successful in the achievement of their set goals, at least partly, after being considered to be paper tigers in the beginning. This justifies the expectation of a similar development for the ICC, especially since it will be a permanent institution. Realist political approach will still be in favour of *ad hoc* tribunals as opposed to a permanent court demanding the compliance of duties,⁵⁴⁰ since the *ad hoc* tribunals „best reconcile the goals of international criminal jurisdiction and the pursuit of political ends.“⁵⁴¹ It is yet sheer impossible to genuinely assess the peacekeeping effects the ICTs have had on Rwanda and Yugoslavia, taking into account all the implications that have been discussed throughout this thesis. They have not been a panacea for the myriad of problems dominating a country after a brutal war, and only time will truly tell whether lasting peace has been established. As of now, the effects of international criminal law cannot entirely be proven. By and large, they seem sound to assume, but their coming into effect remains uncertain and not least debatable.⁵⁴²

The mechanisms of action that arise from the prosecutions can contribute vitally to peace process, but the expectations directed at the Court's work mustn't exceed the doable. When evaluating the ICC's future achievements, it will be crucial to bear in mind that a penal procedure before the ICC can certainly not replace other means of accounting for the past, it can only serve as a subsidiary pillar. A consummated

⁵³⁹ Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden. p. 221.

⁵⁴⁰ Bassiouni, Introduction to International Criminal Law. p. 28.

⁵⁴¹ Ibid. p. 28.

⁵⁴² Farer, "Restraining the Barbarians: Can International Criminal Law Help?." p. 92.

condemnatory sentence is not to be put on a level with successful reconciliation.⁵⁴³ Reconciliation and prosecution need to be balanced in a way that doesn't produce the impression that justice is up for negotiation.⁵⁴⁴ Further, much attention will be directed at the choice of lawsuits: an objective selection of cases will be pivotal in order to silence the voices that lay selectivity to the Court's charge and weaken the impression of it being a tool of western imperialism.

The possibility of the ICC's efforts to remain chanceless without political support is very likely.⁵⁴⁵ For an international tribunal to contribute to the peace process very much depends on the velocity with which it can work, which again is dependant on the support and cooperation of the international community, including support of financial kind. Without witnesses, evidence and testimonies, a court cannot achieve anything.⁵⁴⁶ Much of the ICC's success will depend on the degree to which the states actually make use of it.⁵⁴⁷ „The international community (..) has a rather complicated legislative procedure, no executing power and its judiciary is only beginning to operate on a world wide scale.“⁵⁴⁸ It cannot be affirmed that the ICC enjoys genuine independence due to its linkage to the SC. Independent action is scarcely to be expected in cases that involve its influence. Past experiences have shown that an interplay of forces of coercive diplomacy and legal deterrence are most likely to achieve the goals of international justice and the necessary intermediate objectives such as halting on-going violence. Coercive diplomacy implies the use of force, but not with the goal of a military defeat. Rather it strikes to persuade and corner the affected state or military leaders to bow to the inevitable.⁵⁴⁹

The indictment of Sudan's President Omar al-Bashir serves as a textbook example to summarize the problems related to international criminal jurisdiction: the reproach towards the international community of unjust treatment resulting from the fact that the major powers, with the US leading the way, don't accept the Court's jurisdiction, as well as the fact that the ICC's endeavours in Africa represent dictation and

⁵⁴³ Reese, "Fünf Offene Fragen Zum Internationalen Strafgerichtshof - Und Der Versuch Einer Antwort." p. 80.

⁵⁴⁴ Triffterer, "The Preventive and the Repressive Function of the International Criminal Court." p. 173.

⁵⁴⁵ Nitsche, Der Internationale Strafgerichtshof Icc Und Der Frieden. p. 221.

⁵⁴⁶ Mafwenga, "The Contribution of the International Criminal Tribunal for Rwanda to Reconciliation in Rwanda." p. 12.

⁵⁴⁷ Ibid. p. 17.

⁵⁴⁸ Triffterer, "The Preventive and the Repressive Function of the International Criminal Court." p. 173.

⁵⁴⁹ Rodman, "Darfur and the Limits of Legal Deterrence." p. 532, 536-537.

paternalism of the West, that is anon facilitated by the regulations of complementarity in the Statute. The third-party jurisdiction executed by the Court which made the indictment of al-Bashir possible, since Sudan had not ratified the Treaty of Rome, is even more problematic given the US support for the charges pressed against the controversial president. In particular, the delicate issue of disturbing important transition processes by introducing criminal prosecution in a macro-crime scenario was clearly visible in its fragility when Sudan reacted to the accusations by expelling aid workers. This also shows the political impact of the decisions made by the Prosecutor and the strong role they play within the architecture of the Court. Further, the deterring effects that are aspired for through international criminal jurisdiction did not occur in this case. The probability of an arrest of al-Bashir remains very limited, so the ball is in the court of the international community and the SC once again. A concerted diplomatic strategy will be needed to realize the Court's aspiration to prosecute al-Bashir without losing sight of the bigger goal of halting the ongoing violence.

The attempt to establish impunity as a principle in international relations has witnessed many setbacks. However, since the period of the establishment of the *ad hoc* tribunals, the concept of impunity has been having up wind.⁵⁵⁰ „Historically, the battle for international criminal jurisdiction, which started after World War I, continues with the establishment of the ICC.“⁵⁵¹ Whilst admittedly being very weak in many respects, it is still the strongest tool available for that specific goal. Through regular usage that will require time to set in, the ICC will build up a standing in international relations. Every assessment, especially when negative, consequently has to consider that the Court will need time to show its merits.

5.2 Outlook

It has been laid out how the ICC depends on several factors in order to achieve the goals it was designed for. Below the most important of these factors will be listed. Realist approach to international relations still dominates the strategical policy of many states. The resulting security dilemma predicts the persistance of asymmetry in the global community. Powerful states will thus have to be incorporated into the

⁵⁵⁰ Kirsch, "Introduction." p. 1.

⁵⁵¹ Bassiouni, Introduction to International Criminal Law. p. 683.

architecture of any successful international tool for justice. But a turnaround in the attitude of the US is possible in order for it to stabilize its position. An ongoing refusal of the USA to join in efforts of international criminal jurisdiction would not necessarily mean the deathblow for the ICC. As seen in the conduct of chief prosecutor Moreno-Ocampo and the sustained support of the remaining Western powers, the disposition to subordinate the Court to American tactics is not given.

It has been pointed out how the position of the prosecutor will tip the scales in many of the issues addressed. His policy can turn out in favour of the ICC and could also harm it quite severely. It will be important to observe the future conduct of Moreno-Ocampo to evaluate the picture of the Court he aspires: Given the relatively strong role of the prosecutor, his actions will determine much of the outcome of the questions discussed above. NGOs, media, legal communities and the states will form the audience to this and certainly radiate their influence on him to a certain extent.⁵⁵²

Further, a public and political communication strategy will be crucial for the ICC. The affected population has to understand the crimes and following prosecutions, even more so considering the fact that the media in the concerned state will have an agenda of its own that might not be in favour of the ICC. The Court needs a „public outreach capacity and strategy.“⁵⁵³ Part of this strategy could be the goal to prosecute representative crimes, since it will not be possible to punish all those deserving of punishment. Through channeled and correct information it can also be prevented that hopes are built up that exceed the possibilities of what criminal prosecution can achieve. In combination with this, as already outlined in chapter 5.2, Truth Commissions can serve as an effort designed to contribute to the desired positive effects that prosecution is hoped to produce but cannot fully do so.

⁵⁵² Morris, "Complementarity and Its Discontents: States, Victims, and the International Criminal Court." p. 182.

⁵⁵³ Coliver, "The Contribution of the International Criminal Tribunal for the Former Yugoslavia to Reconciliation in Bosnia and Herzegovina." p. 28-29.

Zusammenfassung

Die Debatte um den ICC, seine Rechtmäßigkeit und Wirksamkeit im Rahmen des Schutzes der Menschheit vor groben Menschenrechtsverletzungen ist sehr komplex. Ob mit dem Statut von Rom ein unabhängiger, unparteiischer und effektiv einsetzbarer Gerichtshof geschaffen wurde, bildet die zentrale Forschungsfrage. Weiters wird der Frage nachgegangen, wie die ablehnende Haltung der USA gegenüber diesem neuen Instrument begründet werden kann. Schlussendlich soll erläutert werden, inwiefern der ICC seine friedensfördernde Wirkung entfalten kann, und, davon ausgehend, ob auf diese Art und Weise grundsätzlich Frieden geschaffen werden kann.

Nach einer kurzen Einführung zum Thema wird in Kapitel 2 eine Einführung in die Theorien der internationalen Beziehungen und eine Abhandlung des Wandels den Frieden als Stellenwert durchlaufen hat, vorgenommen. Die Verrechtlichung von Krieg wird als Teil der Einführung internationaler Normen in Form internationalen Rechts erläutert, gefolgt von theoretischen Grundlagen zum Verhältnis von Frieden und Gerechtigkeit.

Die Entstehung von internationalem Strafrecht wird in Kapitel 3 geschildert und endet mit der Entstehung des ICC. Die kontroversesten Regelungen werden in Kapitel 4 erläutert, unter anderem die Vorbehalte der USA gegen eine Mitgliedschaft. Diese umfassen die Auswirkungen auf Dritt-Staaten, die Rolle von Peacekeeping-Truppen und die Frage der Möglichkeiten, die im Hinblick auf Durchsetzungsmechanismen bestehen. Die problematische Tatsache des undefinierten Straftatbestandes des Verbrechens der Aggression wird ebenfalls behandelt. Aufgrund der hohen Brisanz wird in einem weiteren Unterkapitel ein Ausblick auf die zu erwartende Politik der USA unter dem neuen Präsidenten Obama gemacht.

Das fünfte Kapitel widmet sich der Befriedungsfunktion des Internationalen Strafgerichtshofs. Anhand von vier konkreten Mechanismen, der Individualisierung von Täter- und Opfertum, der Rehabilitierung der Opfer, der Beendigung des Vergeltungskreislaufs und der Förderung von Konfliktkultur, sowie der Standardisierung von Konfliktlösung, werden die konkreten Auswirkungen von Internationaler Strafverfolgung auf ihre Durchführbarkeit analysiert. Als etwaige Alternative wird im Anschluss die Möglichkeit von Wahrheitskommissionen geprüft.

Abschließend wird festgestellt, dass es sich bei der Schaffung des Internationalen Strafgerichtshofs um ein Zeichen des Fortschritts im internationalen Denken in puncto verstärkter Kooperation auf internationaler Ebene handelt, deren konkrete Auswirkungen anfangs unter dem Optimum liegen werden.

Abstract

The debate on the ICC regarding its legitimacy and effectiveness in acting against grave breaches of human rights has been manifold. In this thesis, research is conducted based on the question of whether or not an independent, impartial and effective court has been established through the Statute of Rome. Further, the hostile attitude of the US towards the Court will be discussed in terms of the legitimacy of the arguments put forward. Finally, the peace promoting effects that are expected of international criminal prosecution are analysed regarding their probability and feasibility. Moreover, the question of whether peace can even be established in such a manner is addressed.

After a short introduction, Chapter 2 deals with the theoretical background to international relations and lays out a discourse of the transformation that peace as a value has undergone. A short history of the juridification of war in international law is then followed by theoretical considerations regarding the relation between peace and justice.

The evolution of international criminal law and its temporary culmination in the establishment of the ICC is subject of Chapter 3. The most controversial provisions are depicted in Chapter 4, including the reservation of the USA regarding membership in the treaty. These involve the impacts on third-party states, the role of peacekeeping-troops, the problem of enforcement and the issue of the crime of aggression that has been left undefined. Further, an outlook on future relations between the ICC and the USA under president Obama is made.

Finally, chapter 5 deals with the peace promoting effects of international criminal prosecution. On the basis of four mechanisms – individualization of guilt and the victims, rehabilitation of victims, closure of the cycle of retaliation and promotion of conflict culture, as well as standardization of conflict solving – the impacts of international criminal jurisdiction are analyzed regarding their feasibility and probability. In a short excursus Truth Commissions are analyzed as a possible alternative strategy.

Ultimately, it is concluded that the creation of the ICC constitutes a symbol for progress in terms of enhanced cooperation on the international level, the effects of which will initially lie beneath the possible optimum.

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